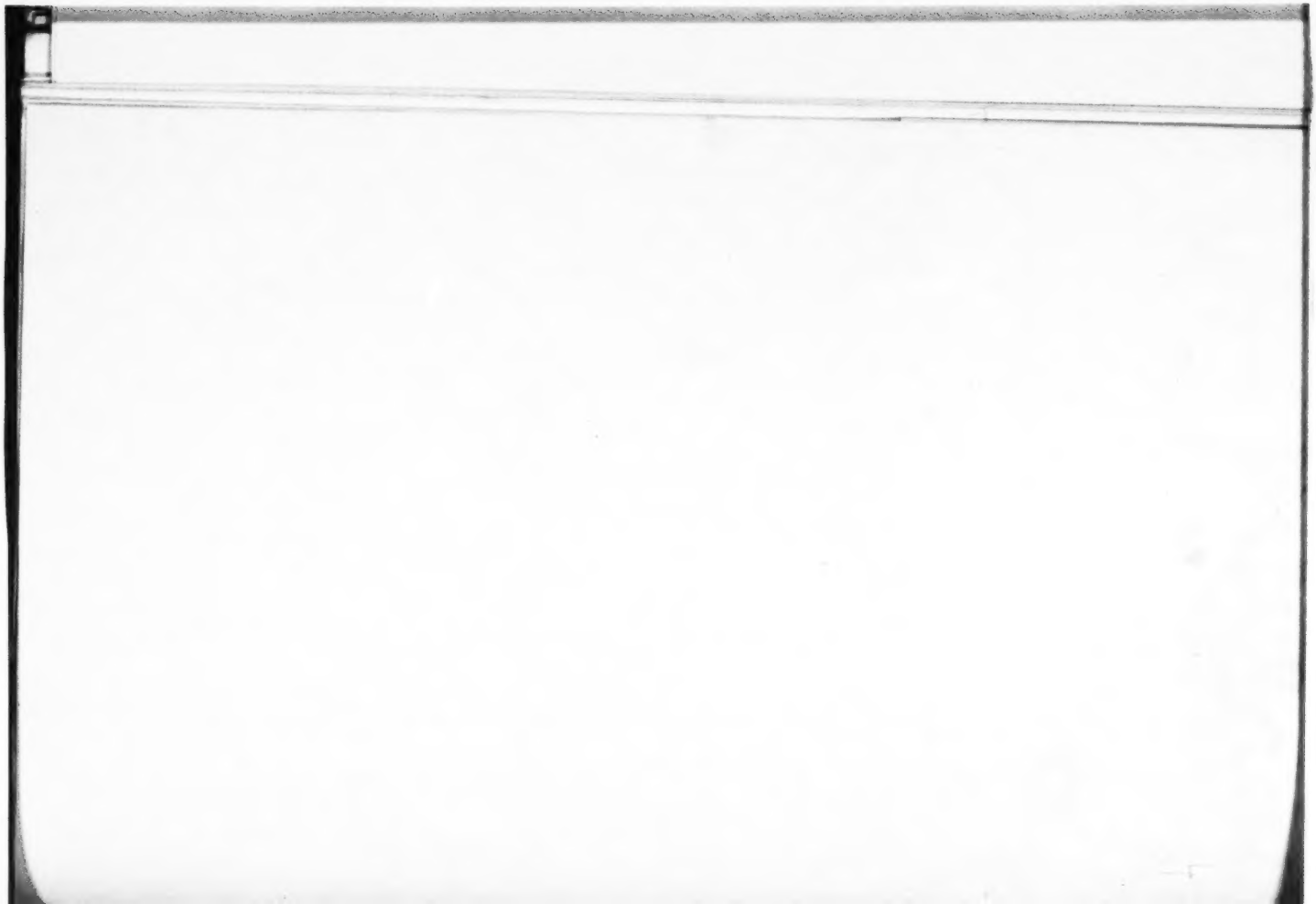

VOLUME II

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 340

THE UNITED STATES OF AMERICA, PETITIONER

vs.

NELSON B. UPDIKE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 23, 1929
CERTIORARI GRANTED OCTOBER 21, 1929

(34471)

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 8241

UNITED STATES OF AMERICA, APPELLANT,

vs.

NELSON B. UPDIKE, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JUNE 23, 1928.

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206 Answer to Interrogatory Number 23.

I have in my possession or under my control the original excess profits tax return of Updike Grain Company of Omaha, Nebraska, for the fiscal period ending June 30, 1917, subscribed August 29, 1917, and filed with the Collector of Internal Revenue at Omaha, Nebraska, on or about August 30, 1917. This is the excess profits tax return filed by Updike Grain Company under the Act of March 3, 1917.

Answer to Interrogatory Number 24.

Said return was received in the office of the Commissioner of Internal Revenue August 11, 1917. A photostat copy of the same is hereto attached. (Photostat copy referred to is same as Exhibit 8 already received in evidence).

Answer to Interrogatory Number 25.

I have in my possession or under my control the original amended excess profits tax return of the Updike Grain Company, Omaha, Nebraska for the fiscal period ending June 30, 1917, subscribed September 27th, 1917 and filed with the Collector of Internal Revenue at Omaha, Nebraska, on or about September 28th, 1917. This is an amended excess profits tax return filed by Updike Grain Company under the Act of March 3, 1917.

Answer to Interrogatory Number 26.

Said return was received in the office of the Commissioner of Internal Revenue October 6, 1917. A photostat copy of the same is hereto attached. (Photostat copy referred to is same as Exhibit 9 already received in evidence).

Answer to Interrogatory Number 27.

I have in my possession or under my control the original income tax return of Updike Grain Company of Omaha, Nebraska for the period July 1, 1917 to August 28, 1917, subscribed January 25, 1918 and filed with the Collector
207 of Internal Revenue at Omaha, Nebraska on or about January 29th, 1918. This is an income tax return filed by Updike Grain Company under the Revenue Act of September 8, 1916 as is shown upon the face of said return.

Answer to Interrogatory Number 28.

There is no record of the date said return was received in the office of the Commissioner of Internal Revenue. A

photostat copy of said return with affidavit of Gorton Roth attached thereto is hereto attached. (Photostat copy of said return with affidavit of Gorton Roth attached thereto has already been received in evidence as Exhibit 14).

Answer to Interrogatory Number 29.

I have in my possession or under my control the original letter of John J. Gillin, Revenue Agent in Charge, Omaha, Nebraska, to Commissioner of Internal Revenue, dated October 26th, 1918, and the report of Revenue Agent L. C. Smith of date October 25th, 1918 with exhibits and Forms 1031 and 1103 attached thereto transmitted in said letter from the said John J. Gillin. There is no record of Form 7894, which was merely a form called "Synopsis of returns for investigation". This form was formerly used in the Income Tax Unit when it was desired to have a field investigation made of a taxpayer. Instead of sending the original return to the Internal Revenue Agent, certain data upon the return would be placed upon Form 7894, and then sent to the Internal Revenue Agent. These forms are no longer used. The particular forms referred to in this Revenue Agent's report can not now be found.

Answer to Interrogatory Number 30.

A photostat copy of Revenue Agent Gillin's letter and a copy of Revenue Agent Smith's report with exhibits (except Forms 7894) are hereto attached. Said letter and copy of report were received in this office October 31, 1918.

208 (Photostat copy of Revenue Agent Gillin's letter and copy of Revenue Agent Smith's report with exhibits (except Forms 7894) have alreadys been received in evidence as Exhibit 2).

Answer to Interrogatory Number 31.

I have in my possession or under my control a letter from John J. Gillin, Revenue Agent in Charge, Omaha, Nebraska, to Commissioner of Internal Revenue dated June 30, 1919 respecting taxes against Updike Grain Company and transmitting a supplemental report of Revenue Agent L. C. Smith respecting said taxes dated June 30th 1919, and said transmitted report.

Answer to Interrogatory Number 32.

Said letter and a copy of supplemental report were received in this office on or about July 11, 1919. Photostat copies of the same are hereto attached. (Photostat copies

letter and supplemental report are included in Exhibit 2 already received in evidence).

Answer to Interrogatory Number 33.

After diligent search of this office I do not find any other correspondence between John J. Gillin, Revenue Agent in Charge, Omaha, Nebraska, and Commissioner of Internal Revenue, respecting the taxes claimed to be due from the Updike Grain Company under the Act of October 3, 1917 or respecting the review and audit made of the books and records of said Updike Grain Company in October, 1918 and June, 1919, respecting said taxes, except copy of letter mentioned in Interrogatory Number 69 and answer thereto.

Answer to Interrogatory Number 35.

I have in my possession or under my control the following letters and telegrams or copies thereof respecting the taxes claimed to be due from the Updike Grain Company under the Revenue Act of October 3, 1917 or respecting the re-
209 view and audit made of the books and records of said Updike Grain Company in October, 1918 and June, 1919, namely:

Letter dated April 27, 1923 from A. B. Allen, Collector of Internal Revenue, to the Commissioner of Internal Revenue.

Copy of letter dated May 2, 1923 from H. F. Mires, Acting Deputy Commissioner of Internal Revenue, to the Collector of Internal Revenue.

Copy of letter dated May 8, 1923 from C. R. Nash, Deputy Commissioner of Internal Revenue, to the Collector of Internal Revenue, transmitting copy of memorandum of date May 4, 1923 from Nelson T. Hartson, Solicitor of Internal Revenue.

Letter dated June 5, 1923 from A. B. Allen, Collector of Internal Revenue, to the Commissioner of Internal Revenue.

Letter dated December 4, 1923 from A. B. Allen, Collector of Internal Revenue, to Honorable D. H. Blair, Commissioner of Internal Revenue.

Copy of letter dated December 10, 1923 from H. F. Mires, Deputy Commissioner of Internal Revenue, to the Collector of Internal Revenue.

Letter dated February 19, 1924 from A. B. Allen, Collector of Internal Revenue, to Honorable D. H. Blair, Commissioner of Internal Revenue.

Letter dated February 21, 1924 from A. B. Allen, Collect of Internal Revenue, to Honorable D. H. Blair, Commissio of Internal Revenue.

Letter dated February 23, 1924 from A. B. Allen, Collect of Internal Revenue, to Honorable D. H. Blair, Commissio er of Internal Revenue.

Copy of letter dated December 30, 1924 from J. G. Brig Deputy Commissioner of Internal Revenue, to the Collect of Internal Revenue.

Copy of letter dated December 31, 1926 to Collector
210 Internal Revenue from C. R. Nash, Assistant to t Commissioner.

Copy of telegram dated February 4, 1927 to Collector of I ternal Revenue, from D. H. Blair, Commissioner of Intern Revenue.

Telegram dated February 4, 1927 to D. H. Blair, Commi sioner of Internal Revenue, from Allen, Collector of Intern Revenue.

Letter dated February 5, 1927 from A. B. Allen, Collect of Internal Revenue, to D. H. Blair, Commissioner of I ternal Revenue.

Answer to Interrogatory Number 36.

Copies of correspondence mentioned in answer to Interro atory Number 35 are hereto attached.

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
OMAHA, NEBR.

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA
IN REPLYING REFER TO

April 27, 1923.

Internal Revenue Bureau
APR 30 1923
OFFICE OF CERTIFY COMMISSIONER
ACCOUNT AND COLLECTIONS UNIT

The Commissioner of Internal Revenue,

Washington, D. C.

Dear Sir:

Reference is to the following cases involving additional tax assessments against Nebraska corporations for the year 1917, the particular cases being:-

Name.	Amt.	Com.List.	Page.	Line.
Updike Grain Co.	$373,911.54	Jan.1920.	14	1
Missouri Valley Elevator Co.	34,561.92	Nov.1919.	7	4
Arlington Lumber & Grain Co.	1,526.47	May 1921.	55	2
Hynes Elevator Co.	23,915.39	Feb.1920.	12	1

The aggregate amount involved, together with accrued interest, is upwards of $500,000.00.

The principal individual stockholder in all these cases I understand, is Mr. W. B. Updike, of Omaha, one of the leading grain men of the west, and the owner of a big daily newspaper, the Omaha Bee. We have had the matter of settlement up with Mr. Updike a number of times, but there is always some impediment in the way, legal or otherwise. Really, I don't know just how to proceed and I would like to have instructions.

The facts seem to be as follows:-

The corporations referred to were all dissolved and the respective assets distributed amongst the stockholders during the month of August (or thereabout), 1917, prior to the passage of the Act of October 3, 1917, which Act was retroactive to January 1, 1917.

To the Commissioner #2.

It is claimed by the taxpayers that they made returns for the part of the year 1917 up to the time of dissolution, and paid the tax as determined up to that time. Later, when the audit was made by the department and the additional assessments were set up, the taxpayers filed claims for abatement which, in the process of time, were rejected by the Commissioner. (See Commissioner letter to Updike Grain Company, #612 Grain Exchange Building, Omaha, Nebraska, dated July 13, 1921, symbol, IT:SA:CR:E-RS).

Now, the situation is this:- The representative corporations were all dissolved about August 1, 1917; the assets were distributed amongst numerous stockholders; several of the stockholders (I think eight or ten) have since died; returns were filed up to the time of dissolution and the tax on said returns was paid: there apparently is no property of the corporations which could be seized by distraint.

It is evident from our knowledge of the circumstances that collection could only be made by suit. Mr. Updike seems to think that there are legal principles involved and court decision that would constitute a defense. On that point I can express no opinion. I would like to have instructions as to how to proceed. Would I be justified in suggesting the possibility of the department entertaining a reasonable compromise and if so, what do you think would be a "reasonable compromise." I do not know that the taxpayers would entertain the idea of a compromise, but we might try. Please advise me.

Very truly yours,

A. B. Allen

ABA-MH

Collector.

May 5, 1938.

[redacted]

[redacted]
Omaha, Nebraska.

Reference is made to your letter of April 27th, in-
closed herewith, in regard to a number of cases involving
claims made by shareholders against Nebraska corporations
for the year 1937.

In view of the fact that the corporations referred to
have not dissolved and that corresponding assets distributed
among the shareholders, that some of the shareholders have
moved away, and that there is apparently no property of the
corporations which could be reached by distraint, and that
collection can apparently be made only by suit, this office
has requested the collector of internal revenue to prepare
an opinion relative to this matter, promptly upon receipt
of this reply you will be communicated with again.

H. P. Nurse

[redacted] Acting Deputy Commissioner.

May 6, 1922.

ASC:CAP:O

Collector of Internal Revenue,

Omaha, Nebraska.

Further reference is made to your letter of April 27th, initialed ABA-MH, in regard to a number of cases involving additional tax assessments against Nebraska corporations for the year 1917.

As you were advised under date of May 2nd, the matter was referred to the Solicitor of Internal Revenue for an opinion. There is now enclosed herewith a copy of his reply which is self-explanatory.

[Signed] C. R. Nash.

Deputy Commissioner.

Enclosure.

SOL:C

MAY 7 1923
SOLICITOR AND COLLECTION'S UNIT

May 4, 1923.

DEPUTY COMMISSIONER NASH:

Reference is made to your memorandum (A&C:O&P:O) under date of May 2, 1922, transmitting a letter from the Collector for the District of Nebraska under date of April 27, 1923, regarding additional assessments for the year 1917 against the following Nebraska corporations:

Updike Grain Co.	$373,911.54	Jan. 1920	Com. List	Page	14,	Line	1
Missouri Valley Elevator Co.	34,561.92	Nov. 1919	"	"	"	7	"	4
Arlington Lumber & Grain Co.	1,526.47	May 1921	"	"	"	55	"	2
Hynes Elevator Co.	23,915.39	Feb. 1920	"	"	"	12	"	1

It appears that all of these corporations were dissolved and the assets distributed among stockholders during the summer of 1917 and prior to the passage of the Revenue Act of 1917. The letter states that the corporations made returns for a fractional part of the year 1917 up to the time of distribution and paid the tax under the rates in force at that time. A later audit of the returns resulted in additional assessments due to the provisions of the Revenue Act of 1917 which were retroactive in application. Assuming that returns were filed in August 1917, suit for the recovery of additional taxes for the year 1917 was barred in August 1922 under the provisions of Section 250 (d) of the Revenue Act of 1921. As the corporations have been dissolved, warrant of distraint against the corporations cannot be enforced as against stockholders of the former corporations and unless the stockholders voluntarily submit an offer in compromise of the amount of the tax there is no means of enforcing liability. If the corporations have any property distraint will lie providing the assessment was made within the period of limitation as prescribed by Section 250 (d) of the Revenue Act of 1921.

The letter of the collector forwarded with your memorandum is returned herewith.

Nelson T. Hartson
Solicitor of Internal Revenue.

hmm.
enc. 11285.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA
IN REPLYING REFER TO A&C:OAP:O

OMAHA, NEBR. June 5,1923.

Commissioner of Internal Revenue,

Washington, D.C.

Reference is made to your letter of May 8th, 1923, initialed A&C:OAP:O, in reply to my letter of April 27th, regarding a number of cases involving additional tax assessments against Nebraska corporations for the year 1917, and enclosing copy of an opinion of the Solicitor of Internal Revenue relative to the collection of these taxes, and I have the honor to advise that Mr. Nels Updike, one of the stockholders of these several corporations, has submitted an offer in compromise of $10,000.00 in lieu of payment of the assessments involved.

Due to the fact that suit for the recovery of these additional taxes is barred by the Statute of Limitations, I am recommending that this offer be accepted.

This offer is being taken up in the regular way, and will appear on my June Supplemental 1923 List, Account #540039.

A. B. Allen
Collector.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA

IN REPLYING REFER TO

OMAHA, NEBR.

December 4, 1923.

RECEIVED BUREAU OF INTERNAL REVENUE DEC 6 1923 OFFICE OF DEPUTY COMMISSIONER OF COLLECTIONS AND ACCOUNTS

ABC:GAF:O

Hon. D. H. Blair,
Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

Please be referred to my letter to you of June 5, 1923, symbol as above, and other correspondence connected therewith, all relating to an offer in compromise in the amount of $10,000, submitted by Mr. H. B. Updike of Omaha, in lieu of payment of certain assessments set up against a number of grain companies in which Mr. Updike was interested and against which assessments the statute of limitation seems to have run.

This matter has been pending since last June and the taxpayer is anxious to know whether or not the department has accepted his offer. My letter of June 5th, recommends acceptance for the reason that the department apparently has no sufficient claim against the interests involved, and it would, therefore, seem to be good judgment to accept the offer as submitted.

The correspondence referred to will give you all the facts in connection with the case.

If the offer is accepted we would file claim for abatement covering the remainder of the assessment and thus relieve our books of a charge which looks big in figures but which does not apparently represent a genuine asset.

Awaiting your reply, I am,

Very truly yours,

A. B. Allen
Collector.

ABA-MH

237

a 7

December 20, 1926.

ASC:GLP:O

Collector of Internal Revenue,

Omaha, Nebraska.

Reference is made to your letter of December 4th, initialed ABA-MH, requesting information as to the status of the offer in compromise filed by Mr. H. B. Updike of Omaha, Nebraska.

In reply, you are informed that a copy of your letter has been referred to Deputy Commissioner Bright of the Income Tax Unit, who will no doubt communicate with you direct in connection with the matter.

(Signed) H. F. Mires

Deputy Commissioner.

SfWi
Cl

298

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA
IN REPLYING REFER TO

OMAHA, NEBR.

February 19, 1924.

RECEIVED IN
FEB 21 1924
SOLICITOR'S OFFICE
BUREAU OF INTERNAL REVENUE

SOL:C:CAB-
197104.

Hon. D. H. Blair,
Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

I am in receipt of copy of your letter of February 12, 1924, addressed to Mr. E. B. Updike, copy hereto attached, symbol as above, having reference to certain additional assessments against a number of corporations in which Mr. Updike was interested.

I also attach hereto copy of my letter addressed to you under date of June 5, 1923, symbol A&C:OAP:O, and also copy of an opinion by Solicitor of Internal Revenue, Nelson T. Hartson, dated May 4, 1923, and addressed to Deputy Commissioner Nash, all in reference to the case at issue, and constituting a part of our file and of your file in said case.

It will be noted that in Mr. Hartson's opinion he says in part:-

> "Assuming that returns were filed in August, 1917, suit for the recovery of additional taxes for the year 1917 was barred in August, 1922, under the provisions of Sec. 250 (d), of the Revenue Act of 1921. As the corporations have been dissolved warrant of distraint against the corporations cannot be enforced as against any stockholders of the former corporations, and unless the stockholders voluntarily submit an offer in compromise of the amount of the tax, there is no means of enforcing liability. If the corporations

have any property distraint will lie, providing the assessment was made within the period of limitation as described by Sec. 250 (d), of the Revenue Act of 1921."

In the copy of your letter of February 14, 1924, addressed to Mr. Updike, and in which you reject the offer in compromise in the sum of $10,000, previously made by Mr. Updike, you say:- "The case will proceed as if no offer had been made."

Now, if the statute of limitation has run as Solicitor Hartson seems to think it has, and if the corporation's property has been distributed (as it has), and there is nothing left to distrain upon, I am at a loss to know what law we can invoke as a basis for further procedure.

In securing an offer in compromise as per my letter of June 5, 1923, we supposed we were complying with the information conveyed by Mr. Hartson's opinion above referred to.

Kindly instruct me as to further procedure.

Very truly yours,

A. W. Alexander
Collector.

ARA-MH
Encs.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA

IN REPLYING REFER TO

February 21, 1924

SOL:C:CAR
197104

Hon. D. H. Blair,
Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

Supplementing my letter to you of February 19, 1924, in Re the above case, symbol SOL:C:-CAR, 197104:

I neglected to state that the taxpayers in the cases at issue failed and refused to file and sign returns for the year 1917 under the provisions of the Act of Oct. 3, 1917, and therefore, under the terms of the Act of Oct. 3, 1917 and the provisions of Article 61, Regulations No. 33, it is possible that Solicitor Bertron was in error, in his opinion of May 4, 1923 (copy of which opinion was attached to my letter of February 19) in "assuming" that the statute of limitations had run.

The taxpayers did file 1917 returns under the Act of September 8, 1916, covering period up to June 30, 1917 (Forms 1031) but they did not file returns under the Act of Oct. 3, 1917 and hence were apparently delinquent and not entitled to the benefits of the statute of limitations.

Very truly yours,

A. B. Anderson
Collector

197104
RECEIVED
FEB 25 1924
SOLICITOR'S OFFICE
BUREAU OF INTERNAL REVENUE

Updike Grain Company et al
CIVIL DIV.

245

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA

IN REPLYING REFER TO

February 23, 1924

197104

RECEIVED IN
FEB 28 1924
SOLICITOR'S OFFICE
BUREAU OF INTERNAL REVENUE
CIVIL DIV

A:OL:C:CAP
197104

Hon. D. H. Blair,
Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

On April 27, 1923, I wrote you in regard to a group of cases, covered by the above symbol, copy hereto attached, in which letter the individual cases were set out with the exception that I did not specifically mention the

Updike Elevator Co., April Com. 1919 List, Page 13, Line 9, Amount $7468.14.

However, this amount was included in the approximate total as stated in my letter of April 27, 1923. The reason why the item was omitted from previous letter was because a claim for abatement was filed in that particular case on Feb. 19, 1920 and we had no report of the rejection of said claim until Feb. 7, 1924. The status of the Updike Elevator case is the same as that of the other four cases mentioned in my letter of April 27, 1923.

The intent of my letter of April 27 was compliance ~~[illegible]~~ with Article 1008, Regulations 62, which reads in part as follows:

"However, no suit for the recovery of unpaid taxes or of any fine, penalty, or forfeiture shall be commenced until the collector shall have submitted to the Commissioner a full report of all material facts and circumstances in the case and shall have received from him express authority to proceed."

In my letter of April 27, 1923, I set up the facts as they appeared at that time and I said: "It is evident from our knowledge of the circumstances

247

912

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA
IN REPLYING REFER TO

DHS 2

that collection could only be made by suit. x x x I would like to have instructions as to how to proceed."

Instead of receiving instructions to institute suit as I had expected, I received an opinion from Solicitor Hartson (copy attached to my letter to you of Feb. 19, 1924) in which he suggested the possibility of a compromise, which suggestion I accepted as instruction and acted on. It appears that such action was ill-advised and a waste of time.

This letter is therefore a repetition of my request of April 27, 1923 to be advised as to whether or not I am authorized to institute suit for recovery, in compliance with the provisions of Article 1008, Regulations No. 62.

Your prompt reply will be appreciated as I deem speedy action necessary.

Very truly yours,

A. B. Allen
Collector

249

212

COPY

December 30, 1924.

IT:R:P:EWC

Collector of Internal Revenue,

Omaha, Nebraska.

Reference is made to your letter dated October 1, 1924 relative to the offers in compromise in the amounts of $200.00 and $10,000.00 tendered by Nelso B. Updike, 618 Omaha Grain Exchange, Omaha, Nebraska, in lieu of additional tax assessed against the following companies:

Updike Grain Company,	
Missouri Valley Elevator Co.,	$10,000.00
Arlington Lumber & Grain Co.,	
Hynes Elevator Company,	
and	
E. Stockham Grain Company,	
Carbon Coal & Supply Company,	$200.00

You request that Special Allowance be issued as your authority to refund the amounts of the above offers to the taxpayer, therefore, same are enclosed and you should secure Form 627 and forward to this office together with the special allowances covering the amounts to be refunded.

J. G. BRIGHT,

Deputy Commissioner.

By

Head of Division.

Enclosure:
Spec. Al.

2/4 29

(COPY)

Washington, D. C.
December 31, 1926.

IT:L:RR:280
HTL

Collector of Internal Revenue,
Omaha, Nebraska.

In re: Updike Grain Company
Omaha, Nebr.

Reference is made to the following tax due from the above-named company:

$373,911.54, assessed on the Commissioner's January 1920 list, Page 14, Line 1.

This office has decided that there is no liability which can be asserted against Mr. Nelson B. Updike, Omaha, Nebraska, et al, as transferees of the property of the taxpayer, pursuant to the provisions of Section 280 of the Revenue Act of 1926. The amount of tax set forth above should, therefore, be abated as uncollectible on Form 53. A copy of this letter should be attached to Form 53 prior to transmitting such form to this office.

(Signed) C. R. Nash,
Assistant to the Commissioner.

R15 253

TREASURY DEPARTMENT TELEGRAM.

WHERE WRITTEN:
SC:DIRE
IRT:R:V:
220256

Washington,
February 4, 1927.

Collector of Internal Revenue,

Omaha, Nebraska.

Reference assessment three hundred seventythree thousand nine hundred eleven dollars fiftyfour cents additional income excess profits taxes against Updike Grain Company fiscal year ended June thirty nineteen seventeen appearing on January nineteen twenty list page fourteen line one STOP This assessment must not be abated on Form fiftythree as suit for collection thereof is about to be instituted against former stockholders.

MAYO
COMMISSIONER.

OFFICIAL BUSINESS.
GOVERNMENT RATES.
CHARGE TREASURY DEPARTMENT, APPROPRIATION FOR
The appropriation from which payable must be stated above line.
DEPARTMENTAL STOCK FORM 1932

216

Treasury Department

Telegraph Office

220256

RECEIVED IN
FEB 5 - 1927
SPECIAL DISBURSING AGENT
BUREAU OF INTERNAL REVENUE

Gimlet

Collect gr. 1 ex.

Omaha Nebr 4PM Feb 4 1927.

J H Blair,

Omaha Nebr.

Referring your wire today in re assessment against Updike Grain Company appearing on January eighteen twenty list page fourteen line one stating that assessment must not be stated as suit for collection thereof is about to be instituted stop Be advised form five three was forwarded to supervisor James R Post for transmittal to your office January seventeen nineteen twenty seventh.

Allen, Collector.

GP

217

257

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA

IN REPLYING REFER TO

February 5, 1927.

FEB - 7 1927

Hon. D. H. Blair,
Commissioner of Internal Revenue,
Washington, D. C.

In re: Updike Grain Company.
Omaha, Nebraska.

My dear Mr. Blair:

Under date of February 4, 1927 I received from you the following telegram:

"Reference assessment three hundred seventy three thousand nine hundred eleven dollars fifty four cents additional income excess profits taxes against Updike Grain Company fiscal year ended June thirty nineteen seventeen appearing on January nineteen twenty list page fourteen line one stop This assessment must not be abated on form fifty three as suit for collection thereof is about to be instituted against former stockholders.

(SIGNED) Blair, Commissioner."

To this I replied by telegram as follows:

"Reference your wire today in re assessment against Updike Grain Company appearing on January Nineteen Twenty List Page Fourteen Line One stating that assessment must not be abated as suit for collection thereof is about to be instituted stop Be advised Form Five Three was forwarded to Supervisor James R. Peat for transmittal to your office January Seventh Nineteen Twenty-Seven.

(SIGNED) Allen, Collector."

This letter is for the purpose of confirming the above telegraphic correspondence.

In reference to the making out of Form 53, which was forwarded to Supervisor James R. Peat for transmittal to your office on January 7, 1927, I wish to add: I made no recommendation as to action to be taken on Form 53, in regard to the abatement of our claim against the Updike Grain Company of Omaha, Nebraska, but merely attached to such form copy of a letter of instruction received from your office which letter of instruction reads as follows:

918 259

D. H. Blair, #2.

"IT:E:RA:280
HTL.

WASHINGTON, D. C.,
December 31, 1926.

Collector of Internal Revenue,
Omaha, Nebraska.

In re: Updike Grain Company,
Omaha, Nebraska.

Reference is made to the following tax due from the above-named company:

$373,911.54, assessed on the Commissioner's January 1920 List, Page 14, Line 1.

This office has decided that there is no liability which can be asserted against Mr. Nelson B. Updike, Omaha, Nebraska, et al, as transferees of the property of the taxpayer, pursuant to the provisions of Section 280 of the Revenue Act of 1926. The amount of tax set forth above should, therefore, be abated as uncollectible on Form 53. A copy of this letter should be attached to Form 53 prior to transmitting such form to this office.

(Signed) C. R. Nash,
Assistant to the Commissioner."

I thought best to acquaint you with all the facts pertaining to this phase of the case.

Very truly yours,

A B Allen
Collector.

ABA:MCS.

261

919

230 Answer to Interrogatory Number 37.

I have in my possession or under my control a letter of date February 19, 1924, from James J. Drakeford, Internal Revenue Agent in Charge, Omaha, Nebraska addressed to the Commissioner of Internal Revenue; a copy of a letter of date February 15 1924, from C. M. Justice, Assistant Deputy Commissioner of Internal Revenue, to the Internal Revenue Agent in Charge at Omaha, Nebraska.

Answer to Interrogatory Number 38.

Copies of correspondence mentioned in answer to Interrogatory Number 37 are hereto attached.

197104

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

Feb. 19, 1924

RECEIVED IN
FEB 21 1924
SOLICITOR'S OFFICE
BUREAU OF INTERNAL REVENUE

OFFICE OF
INTERNAL REVENUE AGENT IN CHARGE
OMAHA DIVISION

SOL:C:CAB
197104

Updike Grain Co. et al
Missouri Valley Elevator Company,
Arlington Lumber & Grain Company,
Hynes Elevator Company,
Omaha, Nebraska.

Commissionor of Internal Revenue,
Washington, D.C.

Attention:
Asst. Deputy Commissioner IT:P

Receipt is acknowledged of your letter of February 15th relative to the above named corporations.

These cases will be given immediate attention, and the list of stockholders submitted just as soon as possible if a record can be secured of these stockholders. See report dated December 21, 1921 made by Revenue Agent C.L. Carlson on the Updike Grain Co. et al.

Jas. J. Drakeford
Revenue Agent in Charge

JJD:SCR

61

FEB 1 5 1924

SOL:C:CAB
197104

Internal Revenue Agent in Charge,

Omaha, Nebraska.

In re: Updike Grain Company,
Missouri Valley Elevator Company,
Arlington Lumber & Grain Company,
Hynes Elevator Company,
Omaha, Nebraska.

Reference is made to unpaid additional corporation income and excess profits tax for fiscal 11-month period ended June 30, 1917, assessed against the Updike Grain Company in the amount of $373,911.54; for fiscal 11-month period ended May 31, 1917, assessed against the Missouri Valley Elevator Company in the amount of $34,541.94; for fiscal 10-month period ended May 31, 1917, assessed against the Arlington Lumber & Grain Company in the amount of $1,546.47; and for fiscal 11-month period ended June 30, 1917, assessed against the Hynes Elevator Company in the amount of $23,915.39.

An offer of $1[illegible],000 submitted in compromise of the above named tax liability has been rejected.

It is requested that an agent be assigned to secure the following additional information.

(1) Date and manner of dissolution of the above named companies, whether by voluntary action of stockholders or by order or decree of court. If by order or decree of court a copy of same should be forwarded.

(2) The names and present addresses of stockholders in these companies, giving number of shares held by each at time of dissolution and corporate assets received by each upon final liquidation of the companies.

CAB mlo 2/14/24 Gm 2/14/24

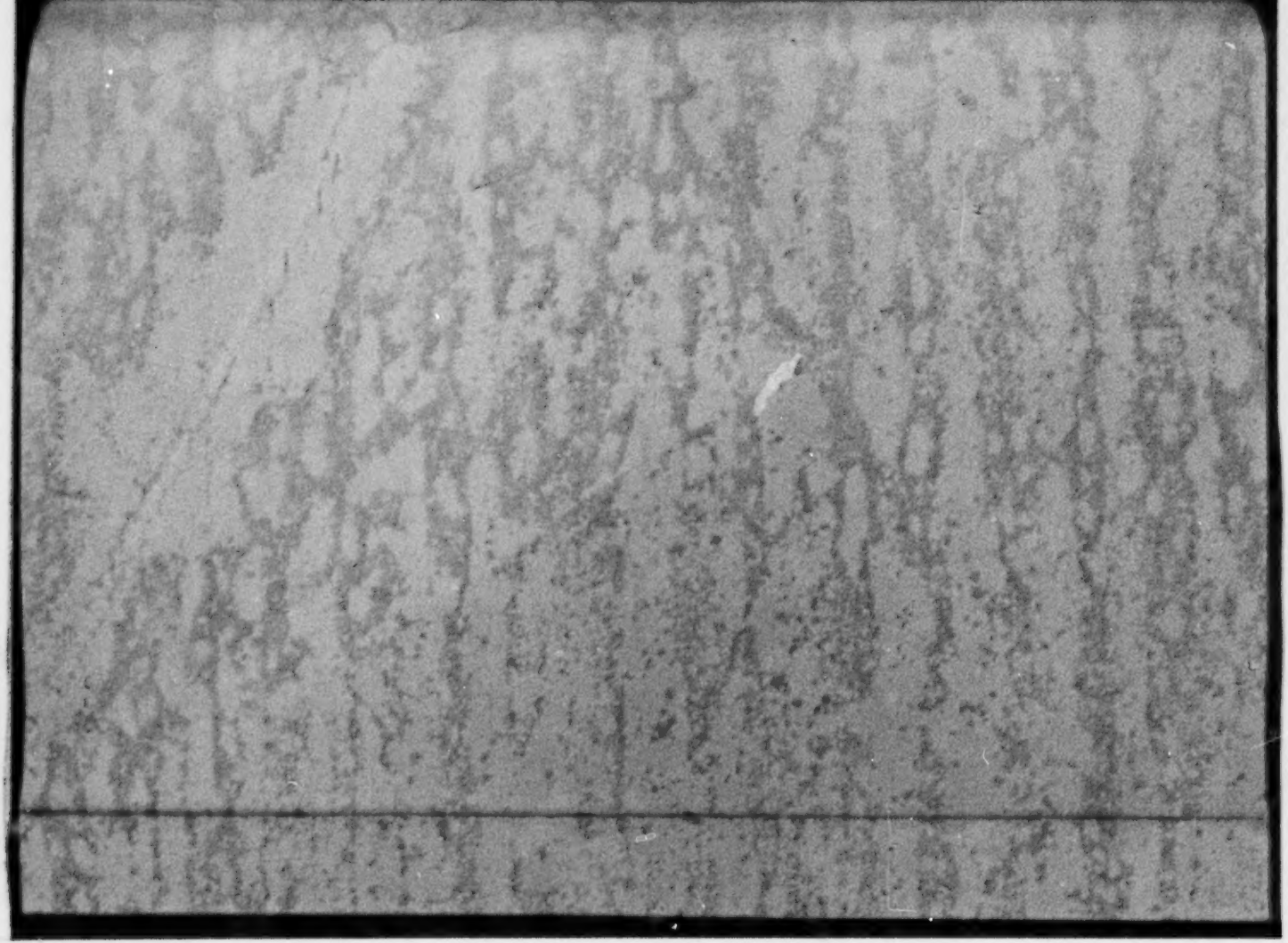
267

The list of stockholders attached to your report on the Updike Grain Company dated October 26, 1918, is incomplete in the files of this office.

Please acknowledge receipt of this letter and forward as soon as possible a report as to the results of your investigation, referring in your reply to the serial number and symbols appearing in the upper left-hand corner of this letter.

(sgd) C. M. Justice

Assistant Deputy Commissioner.



234 Answer to Interrogatory Number 45.

Copy of letter from L. F. Speer, Deputy Commissioner of Internal Revenue, to Joseph and Alvin T. Sapinsky of New York, dated on or about October 27, 1917, is herein before attached as Exhibit 12. The opinion expressed in this letter was afterwards reversed, as appears in Regulations Number 33, Article 61, in accordance with the decision of the Court in Brady vs. Anderson, 240 Federal 665, cited in said article.

235 Answer to Interrogatory Number 54.

After diligent search no record of telegram of Brogan, Ellick and Raymond to Nelson T. Hartson, respecting the above taxes, dated May 8, 1923, can be found.

Answer to Interrogatory Number 55.

This office has offer of compromise dated on or about May 25, 1923 of the above taxes, with the letter of A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska, transmitting said offer of compromise and the recommendations respecting the same.

Answer to Interrogatory Number 56.

Copy of said offer in compromise and copy of letter of A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska, transmitted therewith, are attached hereto:

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Form 656—Revised November, 1922

OFFER IN COMPROMISE

(This side to be filled in by taxpayer.)

JUNE 40039

Omaha, Nebr.
(City and State)

COLLECTOR OF INTERNAL REVENUE,

Omaha, Nebr.
(Address)

The following offer in compromise is submitted to you for transmittal to the Commissioner of Internal Revenue,

(Signature of tax payer.)

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

Charges of violation of law have been made against the undersigned as follows: That this tax has been assessed against the following described corporations Middle Town Co. Missouri Valley Electric Co. Arlington Ice and Power Co. and Hopper Electric Co. of which corporations the undersigned was a stockholder and tax for the year 1917 aggregating $433918.32

Date and place of alleged violation .....

The alleged violation is due to the following cause or causes: .....

Having been advised of the privilege of submitting an offer in compromise of the liability incurred, the sum of $10000.00 is hereby tendered voluntarily with request that it be accepted in lieu of payment of said assessment as a compromise offer and that release be granted the undersigned from all liability resulting from the violation specified.

~~accepting~~ .....

It is understood that this offer does not afford relief from the liability incurred unless and until it is actually accepted, and that the offer can not be considered as having been accepted until the date on which formal notice of acceptance thereof is signed by the Commissioner.

(Insert statement concerning payment of costs, if any)

(Signature)

Sworn and subscribed to before me this

25 day of May 1923

L Hanson
Deputy Collector or Notary Public.

RECEIVED and FILED
MAY 25 1923
OMAHA, NEBR.

Lee 10,000.00

* Strike out name not applicable.

a1

278

CERTIFICATE OF ASSESSMENT

I certify that an examination of the records of the Commissioner's Office shows the following facts as to the assessment and payment of the tax:

NAME AND ADDRESS.	CHARACTER OF ASSESSMENT OR ARTICLE TAXED.	PERIOD COVERED BY ASSESSMENT.	LIST.	YEAR.	MONTH.	PAGE.	LINE.	AMOUNT.
Updike Grain Co.	R & P 6/30/1911	11 Mos. 6/30/17	238	1918	Jan	14	1	373911 54

E. Kenny
Assessment Clerk, Internal Revenue Bureau.

AC

Form 47

Abatement Order No. .....

District Nebraska

Income
(Nature of tax.)

26980

Claimant Updike Grain Co.

Address 625 Omaha Grain Exchange Omaha Neb

Examined and submitted for action ....., 19....

Claim examined by: AA

Claim approved by: AA
Chief of Division.

Amount claimed, $ 373,911.54

Amount allowed, $ None

Amount rejected, $ 373,911.54

COMMITTEE ON CLAIMS:

E H Baldon

J C Rogerson

68696

275

COLLECTOR'S RECOMMENDATION

Commissioner of Internal Revenue,
Washington, D.C.

Yodike Train Co., Omaha, Nebr.
Missouri Valley Elevator Co., " "
Arlington Lbr. & Train Co., " "
Imes Elevator Co., " "

Herewith is an offer made by .....

of .....
(Insert complete address)

on 5/25/27 (Date filed), in compromise of ..... liability* incurred because

of Offer in compromise in lieu of additional tax assessed

in violation of by Commissioner against the above corporations for the

year 1917.

The period of liability is 1917 Return was filed on Form No. .....

This case is (not) in suit. for ..... (Period) on ..... (Date)

The amounts of tax, penalties, etc., heretofore assessed and paid follow:

	Amount assessed	Amount paid	Assessment made on Line	Page	Month & Yr.
Tax	$	$			
Additional tax	SEE LETTER ATTACHED				
Per cent penalty					
Per cent penalty					
Interest					
TOTAL					

COMPROMISE OFFER	$ 10,000.00
Costs incurred, if any	none
AMOUNT PAID	10,000.00

This compromise item appears on page ..... line ..... (or Serial No. 540079) of Supp list

for June 1929 and the amount actually paid ($ 10,000.00)

is included in certificate of deposits ..... bearing date of 6/3/27

I recommend that the offer be ..... accepted ..... for the following reasons:

Corporation all dissolved prior to the passage of the Rev Act 1928 also further fact that the statute of limitations has run.

Date signed ..... 1929 ..... Collector ..... District.

THIS FORM FOR OFFICIAL USE ONLY.
OFFER REJECTED
REJECTION STIPULATED
REFUND ALLOWED
DATE 12-24-29
75755

* The Commissioner of Internal Revenue can not compromise liability under the Food Control Act, War Prohibition Act, Reed Amendment, criminal liability under Title II of the National Prohibition Act, Act of February 9, 1909, as amended, or the Criminal Code.

Where a case is covered by the report of a revenue agent, prohibition agent, or has been referred to a United States Attorney, the collector will procure from either or both, as the case may be, statements in regard to the advisability of accepting or rejecting the offer, and will forward the original of such statements, together with the offer, to the Commissioner of Internal Revenue, with this form.

Where liability is incurred because of failure to collect SALES TAXES, the amount of tax which should have been collected must be indicated.

277

A&C:OAP:O

Commissioner of Internal Revenue

Washington, D. C.

Reference is made to your letter of [illegible], initialed A&C:OAP:O, in reply to my letter of [illegible], recording a number of cases involving [illegible] assessments against Nebraska corporations for the year 1917, and enclosing copy of an opinion of the Solicitor of Internal Revenue relative to the collection of these taxes, and I have the honor to advise that Mr. Hale Updike, one of the stockholders of these several corporations, has submitted an offer in compromise of $10,000.00 in lieu of payment of the assessments involved.

Due to the fact that suit for the recovery of these additional taxes is barred by the Statute of Limitations I am recommending that his offer be accepted.

This offer is being taken up in the regular way and will appear on my June Supplemental 1923 List, Account #540039.

(Signed) A. Nissen

Collector.

a3

617

40 Answer to Interrogatory Number 58.

After diligent search no record of telegram of Nelson . Updike to D. H. Blair, Commissioner of Internal Rev-nue, dated May 20, 1924, respecting the above taxes, can be ound.

Answer to Interrogatory Number 61.

The Bureau of Internal Revenue and the Commissioner of nternal Revenue have at all times asserted and claimed that ssessments, made and entered in the manner in which the ssessment was made and entered against the Updike Grain ompany, in the amount of $373,911.54, were valid and en-rcible assessments.

Answer to Interrogatory Number 62.

The Bureau of Internal Revenue and the Commissioner of nternal Revenue have at all times asserted and claimed that ssessments made and entered in the manner in which the as-ssment was made and entered against the Updike Grain ompany, in the amount of $373,911.54, were valid and en-rcible assessments, as of the dates same were entered or ted upon the assessment roll or list of the Commissioner of nternal Revenue.

Answer to Interrogatory Number 63.

The Commissioner and the Bureau of Internal Revenue ve at all times up to on or about the time of the bringing the above entitled action claimed that the assessment ade against the Updike Grain Company in January, 1920, the amount of $373,911.54, was a valid assessment.

Answer to Interrogatory Number 69.

Copy of letter of date November 20, 1919, addressed to In-rnal Revenue Agent in Charge, Omaha, Nebraska, from ting Assistant to the Commissioner, is hereto at-ched.

[redacted]

In re: Updike Grain Company,
Omaha, Nebraska.

NOV 2 - 1918

IT:IA:EAA:C
EJB-29500995

Internal Revenue Agent in Charge,

Omaha, Nebraska.

Reference is made to your report dated October 26, 1918 and supplemental report dated June 30, 1918, covering investigation by Revenue Agent L. G. Smith, of the books and records of the above named corporation for the purpose of verifying income and excess profits tax liability for 1913 to 1917, inclusive.

An error exists in computing gross income in your amended figures for fiscal years ended July 31, 1915 and July 31, 1916. For 1915, gross income, $442,895.00, is understated by $5,000.00, and gross income for 1916, $609,459.54, is overstated by $5,000.00. Correcting these errors, additional tax due for 1915 and 1916 would be $45.81 and $3,015.53, respectively, and not $95.81 and $3,094.70 as shown.

The additional tax still due by the corporation for the eleven months ended June 30, 1917, $373,911.54, is correctly stated in your supplemental report of June 30, 1918.

Since the corporation failed to file a claim for the refund of overpayment for 1913 amounting to $250.25, this office is barred by Section 252 of the Revenue Act of 1918, in offsetting the amount against the additional taxes found to be due.

The overpayment for 1914 amounting to $113.01 will be offset against the additional tax $145.81 due for 1915, leaving a balance of $32.80 due for this year.

A summary of additional taxes for years follows:

1915	$32.80
1916	3015.53
1917	373911.54
Total	376959.87

21

283

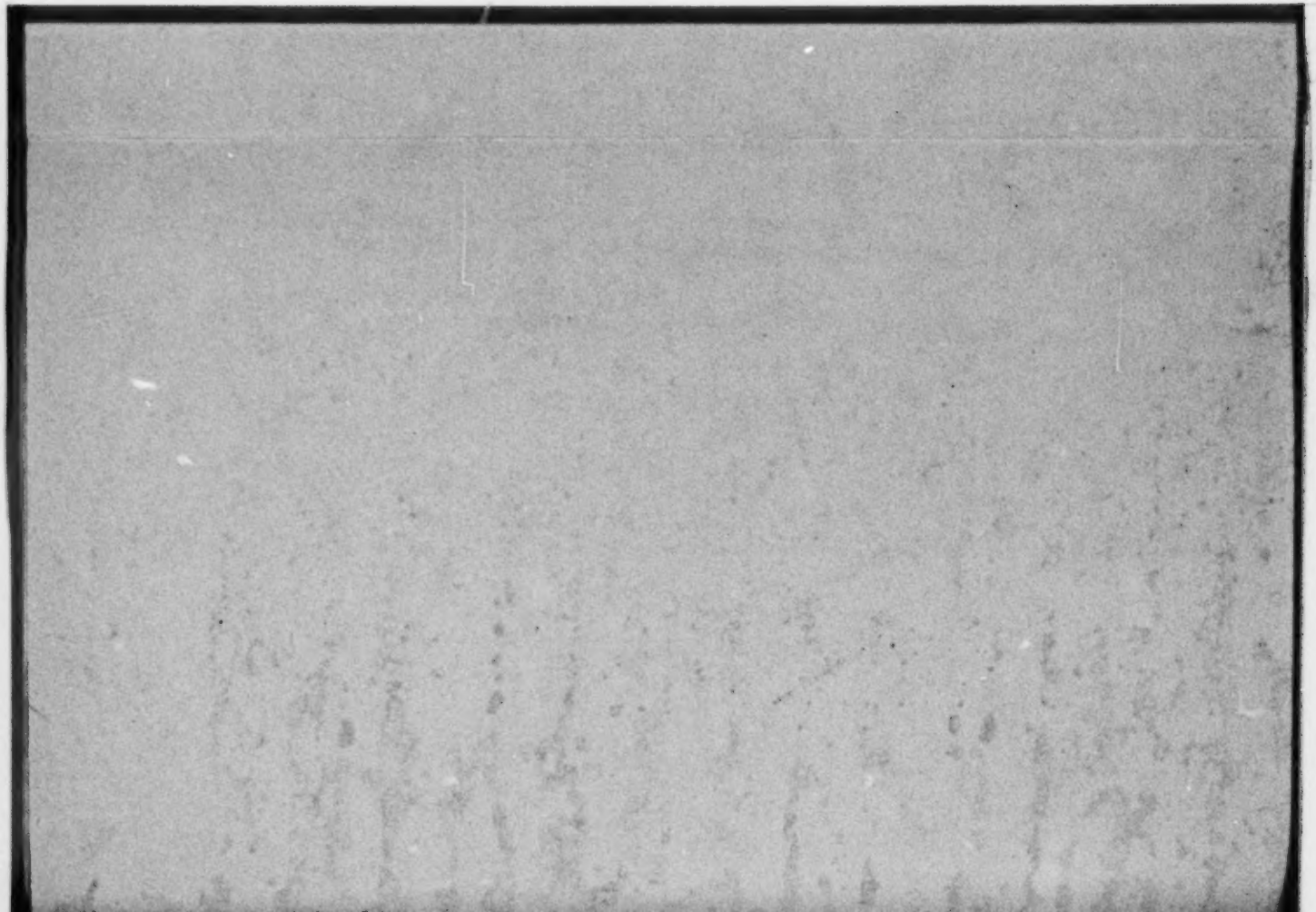
I. R. A. Omaha, Nebraska.

You are instructed to advise the corporation of the result of this audit.

A copy of this letter is being forwarded to the Collector for the District of Nebraska.

Acting Assistant to the Commissioner.

RJB/FH



243 Mr. Ellick: So that we will have all of the testimony of Mr. Blair together, I offer in evidence the following numbered additional interrogatories propounded to Mr. Blair as shown by the record in this case and the answers of Mr. Blair thereto: Interrogatories, 1, 2, 3, 4, 6 and 9, and that is all, except that part of the answer to Interrogatory 6 which says: "Said assessment list and certificate were then presented to C. B. Hurrey, assistant to J. H. Callan, acting Commissioner of Internal Revenue, who approved and signed said Certificate for J. H. Callan, acting Commissioner of Internal Revenue, placing his own initials after the name of J. H. Callan," for the reason that counsel for the government has informed us that that is an erroneous statement of the Commissioner.

No objection was made to the offer but the Court's attention was called to the Commissioner's answer to Original Interrogatory Number 18 relating to the assessment of January, 1920 and the Court was advised that in United States against [against] Haar in the 19th Federal (2d) 399, United States District Court for Georgia had held that an assessment would be invalid that was not based upon a return, The Trial Court was also advised that the government had appealed in this case.

The additional interrogatories propounded to Commissioner Blair and his answers thereto offered in evidence by the defendants and received by the Court are as follows:

Answer to Additional Interrogatory Number 1.

The person who computed and determined the amount of tax imposed by the Revenue Act of October 3, 1917, to-wit: $373,911.54, noted upon the income tax return of Updike Grain Company, subscribed by the President and
244 Treasurer of said company on July 24, 1917 and filed with the Collector of Internal Revenue, Omaha, Nebraska, on July 25, 1917, is believed to have been H. B. Barnett, who at that time was an auditor in the Income Tax Unit; his present address is unknown; he has resigned and left the service of the government.

Answer to Additional Interrogatory Number 2.

The amount of tax mentioned in the preceding answer is believed to have been computed and determined on or about September 4, 1919 and noted on said income tax return about the same date.

Answer to Additional Interrogatory Number 3.

It is believed that said H. B. Barnett noted the said amount of $373,911.54 upon said income tax return, being the amount of excess profits tax imposed upon Updike Grain Company by the Revenue Act of October 3, 1917.

Answer to Additional Interrogatory Number 4.

It is believed that the person whose initials appear on the right of the rubber stamp impression appearing upon the income tax return of Updike Grain Company subscribed by the President and Treasurer thereof of July 24, 1917 and filed with the Collector of Internal Revenue on July 25, 1917 is H. B. Barnett above mentioned.

Answer to Additional Interrogatory Number 6.

The names, official positions held and present addresses of the persons whose initials appear upon the lower part of the exhibit attached to my answers to interrogatories heretofore filed, being the assessment list showing the assessment of the excess profits tax imposed by the Revenue Act of October 3, 1917 in the amount of $373,911.54 upon Updike Grain Company for eleven months' period ended June 30,
245 1917, subscribed by J. H. Callan, Acting Commissioner of Internal Revenue, with statement of the particular duty which each of said persons performed with respect to said assessment (insofar as such facts can now be ascertained), are as follows:

T. F. Langley, Chief Proving Section, Bureau of Internal Revenue; Present address: Bureau of Internal Revenue, Washington, D. C.;

J. Graham, Assistant Chief, Proving Section, Bureau of Internal Revenue; Present address: Bureau of Internal Revenue, Washington, D. C.;

F. P. Cox, Controller in Proving Section, Bureau of Internal Revenue, deceased;

C. B. Allen, Head, Administrative Division, Bureau of Internal Revenue; Present address: Bureau of Internal Revenue, Washington, D. C.;

George W. Newton, Deputy Commissioner, Bureau of Internal Revenue; Present address: Washington, D. C.;

R. L. Ilsley, Head, Collection Division of Accounts and Collections Unit, Bureau of Internal Revenue; Present address:

Accounts & Collections Unit, Bureau of Internal Revenue, Washington, D. C.;

Miss I. B. Higley, in charge of Bookkeeping Machines, Proving Section, Bureau of Internal Revenue; Present address, Washington, D. C.;

George M. Maynard, Bookkeeper, Accounts and Collections Unit, Bureau of Internal Revenue; Present address: Prohibition Bureau, Washington, D. C.;

C. B. Hurrey, Assistant to J. H. Callan, Acting Commissioner, Bureau of Internal Revenue; Present address; Washington, D. C.

246 Said assessment list and certificate were prepared under the supervision of Miss I. B. Higley, in charge of Bookkeeping Machines, and said certificate was then initialed by her; said list and certificate were then transmitted to, approved, and said certificate initialed successively by said F. P. Cox, J. Graham, T. F. Langley, C. B. Allen, George W. Newton, George M. Maynard, R. L. Ilsley.

Answer to additional Interrogatory Number 9.

Photostat copies of Form 53 forwarded to Supervisor James R. Peat under date of January 7, 1927 for transmittal to the Commissioner of Internal Revenue and correspondence relating thereto are hereto attached.

(COPY)

Washington, D.C.,
December 31,1926.

IT:E:RR:280
NYL

Collector of Internal Revenue,
Omaha, Nebraska.

In re: Updike Grain Company,
Omaha,Nebr.

Reference is made to the following tax due from the above-named company:

$373,911.54, assessed on the Commissioner's January 1920 List, Page 14, Line 1.

This office has decided that there is no liability which can be asserted against Mr. Nelson B. Updike, Omaha, Nebraska, et al, as transferees of the property of the taxpayer, pursuant to the provisions of Section 280 of the Revenue Act of 1926. The amount of tax set forth above should, therefore, be abated as uncollectible on Form 53. A copy of this letter should be attached to Form 53 prior to transmitting such form to this office.

(Signed) C.R.Nash,
Assistant to the Commissioner.

FEB 10 1927

IT:C:OC:1:MSV

Collector of Internal Revenue,

Omaha, Nebraska.

Reference is made to Form 43 submitted by you against the Updike Grain Co., Omaha, Nebraska, in the amount of $978,911.64 for the year 1917.

In this connection you are advised that this office has been informed by the Office of the General Counsel that a suit for collection is about to be instituted against the former stockholders of the taxpayer company, and in view of this information, the uncollectible claim has been rejected.

J. H. SMITH,
Assistant to the Commissioner.

By
Head of Division

TREASURY DEPARTMENT
Bureau of Internal Revenue
(Form 47, Revised May, 1926)
JAN 18 1927.
Office of Deputy Commissioner, Internal Revenue, Collection District

REPORT OF UNCOLLECTIBLE TAXES

Income Tax
(Classification)

RECEIVED
JAN 7 1927
DIS[illegible] NEBR.
Collector to be plainly stamped here

Ry 701

Name of party assessed Updike Grain Company.
Address of party assessed Omaha, Nebraska.
Character of tax assessed add Income 6/30/17

DEPUTY'S AFFIDAVIT

I, T Hanson, Deputy Collector of Internal Revenue for Division No. ..... in the District designated above, hereby certify that the taxes or duties charged to and assessed against the above named have not been collected; that I demanded payment of said taxes and duties, of him on ....., 192 ; that I have been unable to collect said taxes and duties, or any portion thereof, for the reason that See letter attached

QUESTIONS TO BE ANSWERED BY DEPUTY COLLECTOR

1. Does the taxpayer reside at the given address?
2. Did the taxpayer leave a forwarding address at the post office?
3. Did you make inquiry of the person from whom the taxpayer rented his home or office relative to his present address?
4. Did you make a similar inquiry of the nearest neighbor, or place of business?
5. What public records were examined to determine whether or not the taxpayer is a property owner?
6. Was any information secured relative to the taxpayer's present location?

And I further certify that he had no property liable to distraint for the said taxes at the time when warrant of distraint could first lawfully be issued therefor, i. e., ten days after the first demand for the same, or since; that I made diligent effort to collect the said taxes and duties, and that the failure to collect the same did not arise out of or through any omission or neglect of duty on my part.

T Hanson
Deputy Collector.

Subscribed and sworn to before me this
7 day of January 1927
Russell C. Anderson,
Dep. Coll.

Recommended for approval.
James Peart

[illegible] OF AUDITS & COLLECTIONS
Post Office Box 544
ST. PAUL, MINNESOTA

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COLLECTOR'S CERTIFICATE

I HEREBY CERTIFY that I have carefully investigated the facts set forth in this claim, and am satisfied that, [redacted] .....

.....

they are in all respects just and true. And I further certify, from personal examination, that the taxes enumerated above are found on the page and line of assessment list indicated now on file in my office; and that the said taxes are included in that list as charged to me by the Commissioner of Internal Revenue; and I further certify that no credit has heretofore been allowed in any form on account of the taxes herein claimed as uncollectible and that none of them has been collected.

Assessment List					Assessed tax and penalties	Memoranda assessment	Date of issue			Date from which found to be uncollectible
Month	Year	Part	Page	Line			Form 17	Form 21	Form 49	
Jan.	192	Com.	14	1	373,911.54		7-16-21	9-23-21	12-22-21	1-7-27

Bond	Amount	Date	Surety	Referred to United States Attorney
	$			

Jan. 7, 192 7

A B Allen
Collector.

Assessment Clerk, Commissioner's Office.

[redacted]

CLAIM No.

Schedule Number RL 901 District .....

Allowed or Rejected Number .....

(Nature of tax)

Claimant .....

Address .....

Examined and submitted for action 192

SCHEDULE No.

Claim examined by—

Claim approved by—

Chief of Section.

COMMITTEE ON CLAIMS

Amount claimed... $.....

Amount allowed... $.....

Amount rejected... $.....

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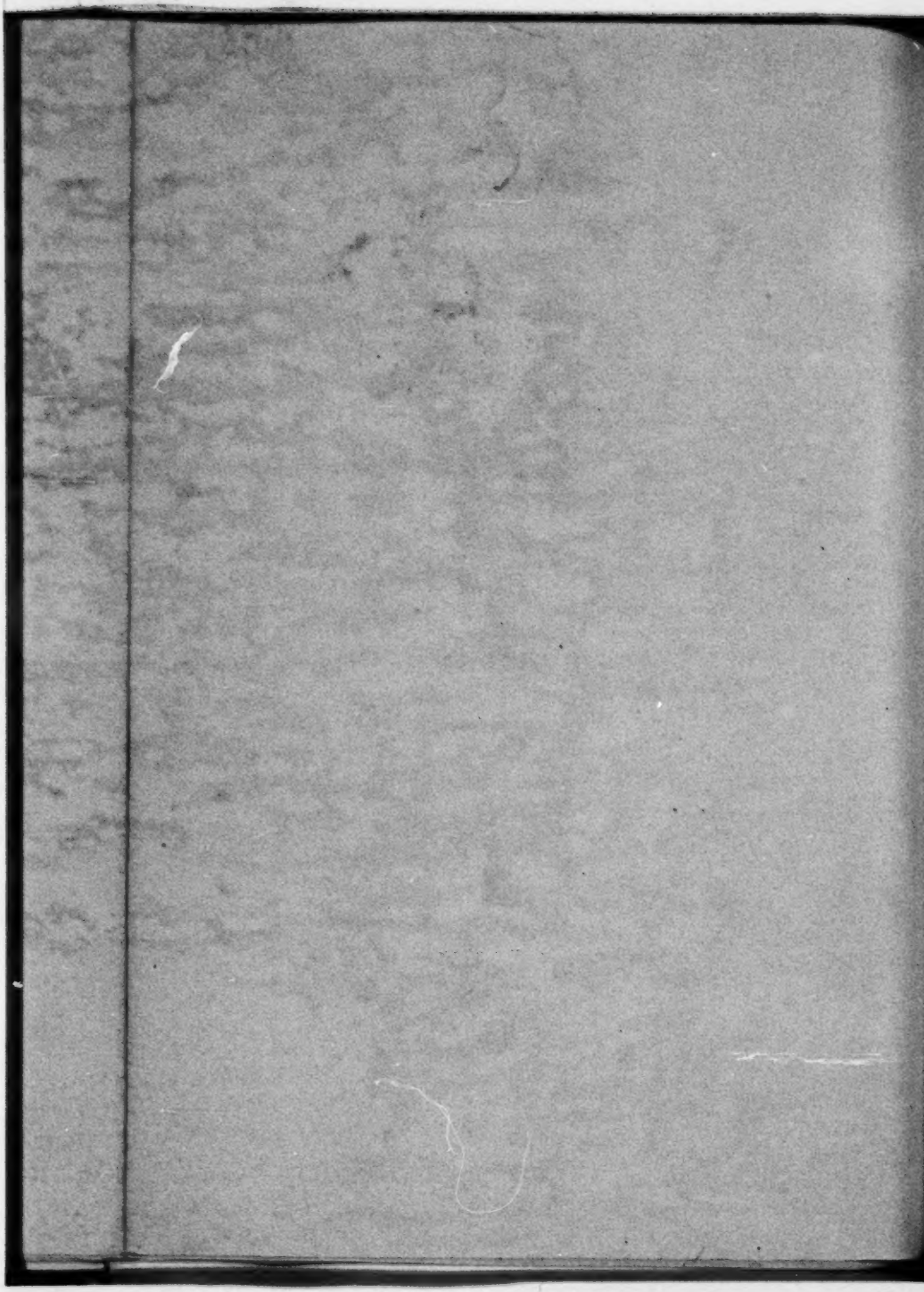


251 Mr. Ellick: We offer in evidence Interrogatory Number 35 of the original interrogatories and that much of the answer of A. B. Allen to the original interrogatories which appear in his answer 35 as follows: "Yes the following letters and telegram are copies from the original letter dated December 31, 1926 to the Collector of Internal Revenue from C. R. Nash, Assistant to the Commissioner." We also offer in evidence the following numbers of the original interrogatories and the answers of A. B. Allen, Collector of Internal Revenue, thereto. Interrogatory Number 40 and 42.

The answers to said Interrogatories 35, 40 and 42, were received in evidence without objection and are as follows:

Answer to Interrogatory Number 35.

A. B. ALLEN, Collector of Internal Revenue, answered Original Interrogatory Number 35:

That he had in his possession on under his control the following letters and telegrams or copies thereof between the Collector of Internal Revenue at Omaha, Nebraska, and the Commissioner of Internal Revenue, respecting the taxes claimed to be due from Updike Grain Company under the Revenue Act of October 3, 1917 or respecting the review and audit made of the books and records of said Updike Grain Company in October, 1918 and June, 1919 as follows:

"Original letter dated December 31, 1926 to Collector of Internal Revenue from C. R. Nash, Assistant to the Commissioner." A copy of said letter is hereinbefore set forth as part of the answers of D. H. Blair to interrogatories of defendants.

Answer to Interrogatory Number 40.

As disclosed by the records of the Collector's office written notice and demand for payment was mailed to Updike Grain Company for the payment of the tax of $373,-
252 911.54 under date of February 10, 1920.

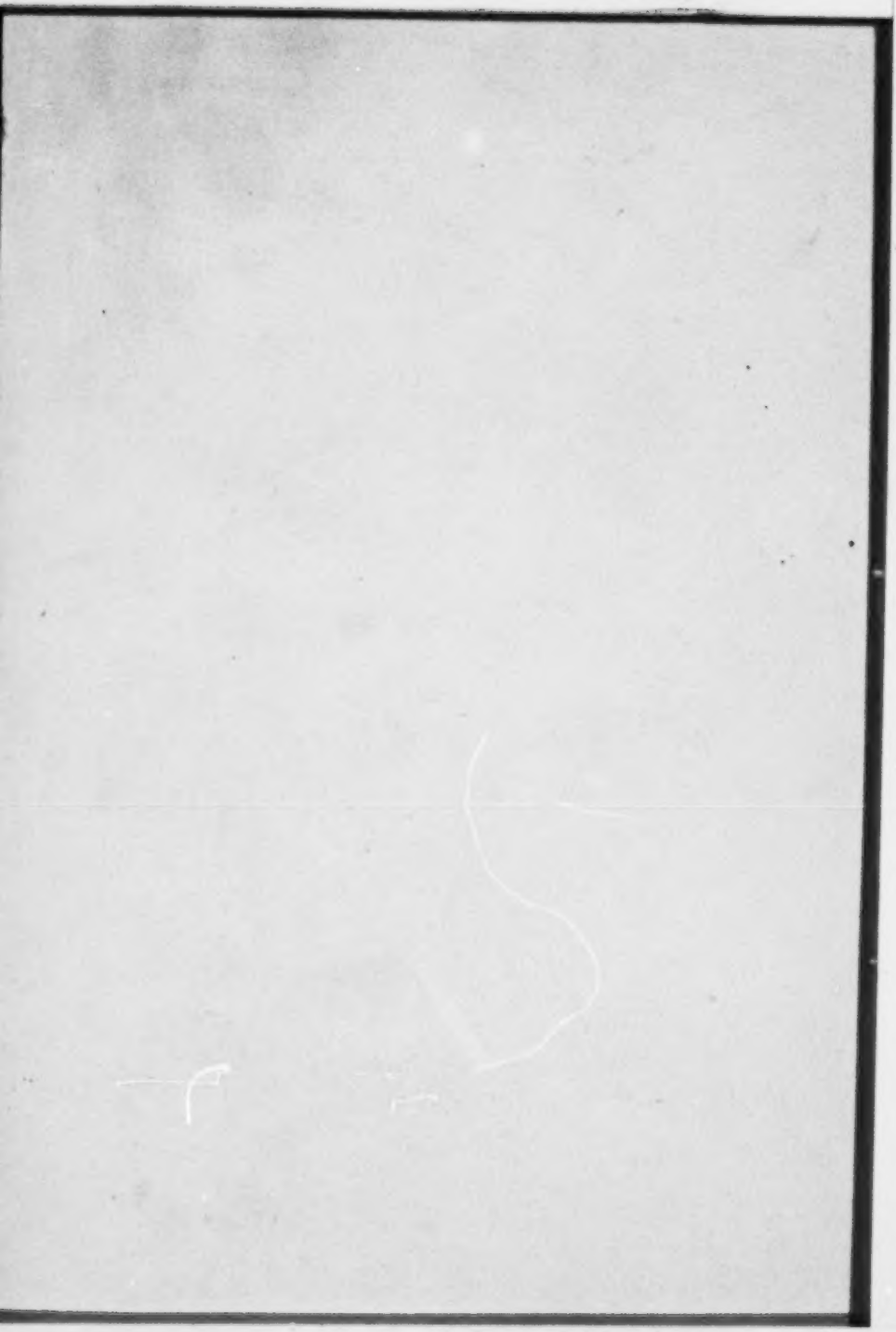
Answer to Interrogatory Number 42.

After diligent search original letter of Updike Grain Company to George L. Loomis, Collector of Internal Revenue, Omaha, Nebraska, dated October 2d, 1917, can not be found.

Mr. Ellick: We offer in evidence Additional Interrogatory Number 10 and the answer of A. B. Allen, Collector of Internal Revenue, thereto, Received without objection.

Answer to Additional Interrogatory Number 10.

Copies of original assessment list and certificate of assessment of $373,911.54 against the Updike Grain Company sent from the office of the Commissioner of Internal Revenue to the Collector of Internal Revenue at Omaha, Nebraska, in November, 1919 or January or February 1920, are attached hereto.



UNITED STATES INTERNAL REVENUE

ASSESSMENT LIST

TRANSFERRED TO CONSOLIDATED LIST

District NEBRASKA — INCOME TAX — Date JANUARY 1920

	NAME AND ADDRESS OF TAXPAYER	DESCRIPTION OF ITEM	TOTAL TAX	DATE PAID	REMARKS
0	UPDIKE GRAIN CO. 625 OMAHA GRAIN EXCHANGE, OMAHA, NEBR.	7/31/16 1031 R.A.R.10/26/18	2 790 08	2/16/20	
1	" "	6/30/17 11 MOS.39500995 VA R.A.R.6/30/19	373 911 54		11-17-8-16-21 2-373911
7					
8					
9					
		TOTAL	376 697 62		
		GRAND TOTAL	423 974.39		

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Approved by the Comptroller of the Treasury
July 24, 1919

TRANSFERRED TO CONSOLIDATED LIST.

TAX LIST REPORT

ADDITIONAL ASSESSMENTS.

District: NEBRASKA List: INCOME TAX (Kind of tax.) JANAURY 1920 (Month or section.) Date:

TO THE COMMISSIONER OF INTERNAL REVENUE:

I hereby certify that the following transactions affecting the tax list described above have been recorded on my books this month:

....., Collector.

LINE NO.	TAXES COLLECTIBLE		AMOUNTS	✓	
1	Balance brought forward from last report		$		
2	Returns filed during month				
3	Revisions in returns made by Collector (increases)				
4	Received from Commissioner	Form 23 D, dated ..... $			429 974 31
		Form 23 A, dated ..... $			
5	Transfers from other Districts	..... (District.) $			
		..... (District.) $			
		..... (District.) $			
6	Returned checks (charged to taxpayers' accounts)				
7	Refund vouchers (charged to taxpayers' accounts).	Paid by Collector, per abstract ..... $			
		Certified to Commissioner for payment, per abstract ..... $			
8	Total to be accounted for				429 974 31
9	Collections				
10	Transfers to other Districts	..... (District.) $			
		..... (District.) $			
		..... (District.) $			
11	Abated during month	By order of Commissioner ..... $			
		By Collector, per abstract ..... $			
12	Balance of Taxes Collectible at close of month		$		$

ABATEMENT CLAIMS PENDING

13	Balance brought forward from last report	$	$
14	Abatement claims filed during month		
15	Total to be accounted for		
16	Abatement claims allowed during month (see Item 11)		
17	Abatement claims rejected during month — By order of Commissioner ..... $ / By Collector ..... $		
18	Balance of abatement claims pending	$	$

COMMISSIONER'S CERTIFICATE

I HEREBY CERTIFY that I have made inquiries, determinations, and assessments of the taxes, penalties, etc., of the above classification specified in the list and find that the amounts of taxes, penalties, etc., stated, as corrected by the statement of differences, are due from the individuals, firms, and corporations opposite whose names such amounts are placed and that the amount chargeable to the Collector is as follows:

	TOTAL DEBITS	TOTAL CREDITS	
As reported by Collector	$ 429 974 310	$	$ 429 974 31
As audited by Commissioner			
Differences shown on Form 23 D, No.			

Dated at Washington, D. C., JAN. 27, 1920. Acting Commissioner of Internal Revenue.

RECD - 32 - 29
FEB 6 1920
DIST. NEBRASKA

JAN 29 1920
AUDITOR OF ACCOUNTS

3

255 Mr. Ellick: We offer in evidence the following original interrogatories and the answers of James J. Drakeford thereto. Interrogatories 33, 57 and 69. Received without objection.

Interrogatory No. 33. "Have you in your possession or under your control, any other correspondence between John J. Gillin, Revenue Agent in Charge, Omaha, Nebraska, and Commissioner of Internal Revenue, respecting the taxes claimed to be due from the Updike Grain Company, under the Revenue Act of October 3d, 1917, or respecting the review and audit made of the books and records of said Updike Grain Company in October, 1918, and June, 1919, respecting said taxes."

Answer to Interrogatory Number 33 by James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska.

A diligent search of the files of this office fails to disclose any correspondence described by this interrogatory.

Answer to Interrogatory Number 57.

256 After diligent search no record of letter of Gorton Roth to James J. Drakeford, dated February 22, 1924, can be found in this office.

Answer to Interrogatory Number 69.

After diligent search no letter of the Commissioner of Internal Revenue to John J. Gillin, Revenue Agent in Charge, dated November 20, 1919, relative to investigation of the income tax returns for the years 1913 to 1917 inclusive of Updike Grain Company can be found in this office.

Mr. Ellick: We offer in evidence the following interrogatories of the original interrogatories and the answers of T. F. Langley, Head of the Proving Section, Income Tax Unit. Interrogatories Number 5, 10, 11, 13 and 19. Received without objection.

T. F. Langley answered Interrogatory Number 5 as follows:

The amount of additional tax noted upon said return namely the original income tax return of the Updike Grain Company of Omaha, Nebraska, for the fiscal period ending June 30, 1917, subscribed July 24, 1917 and filed July 25, 1917, was computed and determined by the Corporation Audit Divi-

sion, Income Tax Unit; the determination being first made by an auditor of said division, based upon a report received from the Revenue Agent in Charge at Omaha, Nebraska under date of October 26, 1918 and a supplemental report from the same source, dated June 30, 1919, and thereafter approved by the Head of said division.

Answer to Interrogatory Number 10.

The memorandum of the amount of tax to be assessed was placed (as stated) upon the return of the Corporation Audit Division of the Income Tax Unit. There is no record of the name of the particular auditor who made said notation.

257 Answer to Interrogatory Number 11.

The procedure above mentioned was in accord with the custom and practice then prevailing in the office of the Commissioner of Internal Revenue respecting the assessment of additional income and war profits taxes.

Answer to Interrogatory Number 13.

As heretofore stated, no assessment was endorsed upon any income tax return, although as explained in detail above, it was the practice of the Audit Division, when it determined that there was an additional tax due from a tax-payer, to note the amount to be assessed upon a return filed by the taxpayer for the taxable year in question.

Answer to Interrogatory Number 19.

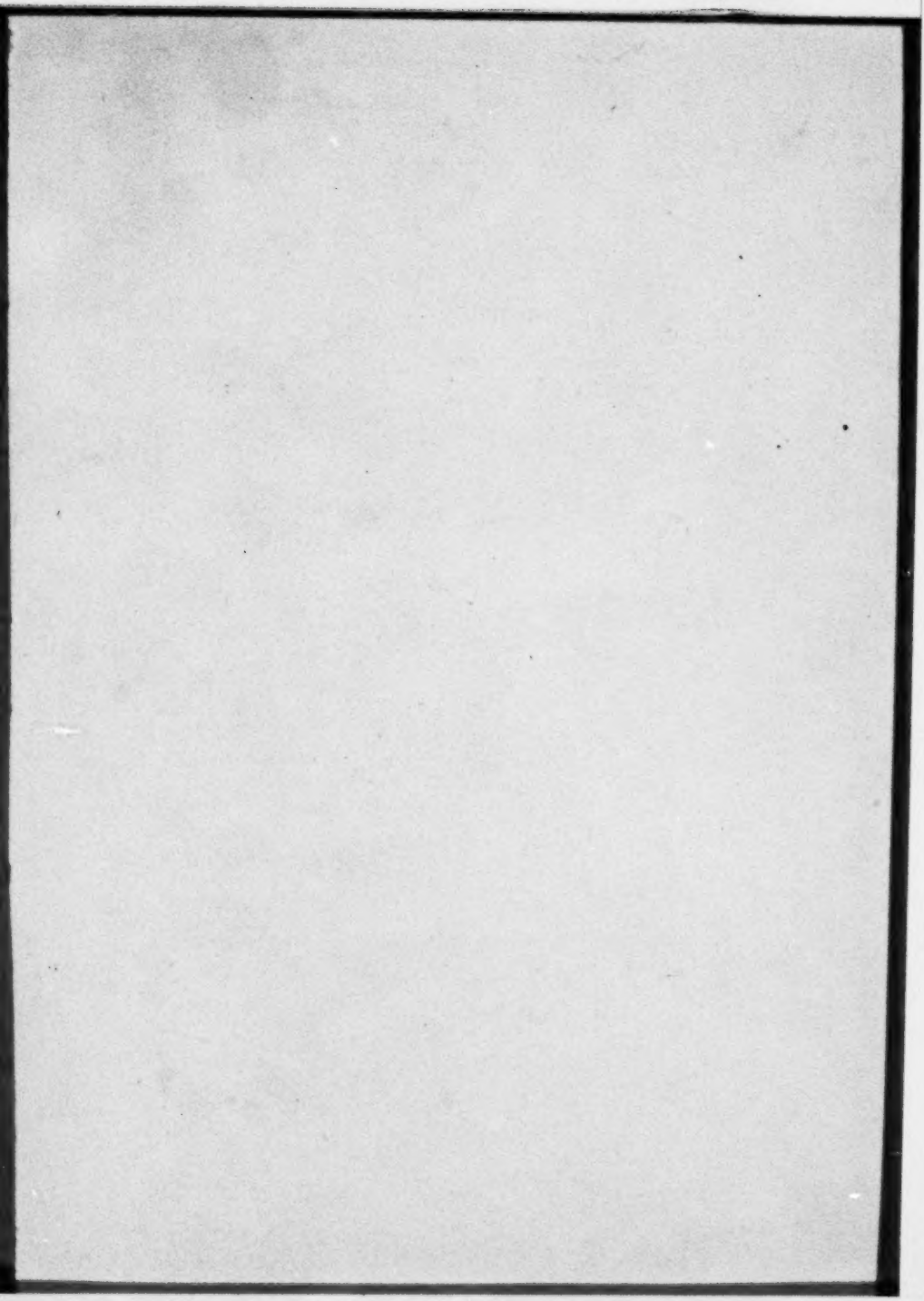
The procedure in making said additional assessment was in accordance with the practice prevailing in the Income Tax Unit with respect to assessments of like nature against other taxpayers.

MR. GORTON ROTH further testified as follows:

Mr. Ellick: "Mr. Roth, I call your attention to exhibit number 17. State what that is." To which witness answered: "It is a letter received by the Updike Grain Company from J. H. Callan, Assistant Commissioner, under date of September 5, 1919."

Mr. Ellick: We offer in evidence Exhibit number 17. Received without objection.

Exhibit number 17 received in evidence is as follows:



TREASURY DEPARTMENT

WASHINGTON

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

ADDRESS REPLY TO
COMMISSIONER OF INTERNAL REVENUE
AND REFER TO

IT:IA:C1
GTR

September 5, 1919.

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Updike Grain Company,

Omaha, Nebraska.

Sirs:

Please furnish this Bureau, for use in connection with the adjustment of claims filed by individual stockholders of your company, an affidavit giving the following information in regard to dividends received by such individuals during 1917 and stated to have been declared out of the surpluses accumulated during different years and consequently taxable at different rates under the Income Tax Act of October 3, 1917.

1. Amount of surplus and earnings accumulated each year out of which dividends were paid.

2. Gross amounts of dividends paid each year, and rate declared on each kind of stock.

3. Date dividends were determined and made available to stockholders.

4. Whether or not at the time the dividends were declared they were specifically declared to have been from earnings or profits accumulated during any particular year; if so, please state the year.

5. Amount of net earnings from January 1, 1917, to date of payment of the dividends in that year.

6. Number of shares of outstanding stock, kind of stock, and par value per share.

This information will be placed on file for reference in connection with any other claims involving the same question.

Respectfully,

J. H. CALLAN,
Assistant to the Commissioner.
By

C M Johnson
Acting Chief of Section.

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259 The attention of witness Gorton Roth was next called to Exhibit number 18, pages one and two; and asked: "Is that the answer that you wrote to the letter, exhibit, and mailed to the address stated in the letter, being in answer to Exhibit 17?", to which witness answered: "It is the letter that I sent personally in answer to that letter."

Mr. Ellick: We offer in evidence Exhibit number 18, pages one and two. Received without objection.

Exhibit number 18 received in evidence is as follows:

Omaha, Nebr.
September 8th, 1919.

Mr. C. M. Johnson,
Acting Chief of Section,
J. H. Callan,
Asst. to Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

Referring to your letter of September 5th, File IT-IA:C1 GTR, addressed to the Updike Grain Company, beg to advise that the Updike Grain Company is not and has not been in existence since August, 1917.

However, in answer to your letter will state that the writer was the last Secretary of the Updike Grain Company and that the old records of the Company showsas follows:

(1) The company carried over no surplus from the previous year. For the year ending June 30th, 1917 the company earnings distributed in dividends to the stockholders were $2,200,000.

(2) The company paid to stockholders during 1917 $2,100,000 in dividends, of which $1,000,000 was earned during the year 1916 and $1,100,000 during the year 1917.

(3)

March 5, 1917	20%	cash	$200,000.00
April 9, 1917	10%	cash	100,000.00
April 16, 1917	10%	cash	100,000.00
April 30, 1917	100%	stock	1,000,000.00
June 26, 1917	35%	cash	700,000.00

The above dividends were paid to stockholders the date declared.

(4) Dividends were all declared payable out of earnings of current fiscal year as those were the only earnings undistributed out of which they could have been declared.

(5) The company had no cut-off during its fiscal twelve months period ending June 30th, 1917, and for all purposes counted that the earnings were accumulated pro-rata over the entire period, which would put one-half of the earnings in the year 1916 and one-half in the year 1917. As stated above the company had no cut-off on January 1st, 1917, but the earnings for the half year, January 1st, 1917 to June 30th, 1917, were $1,200,000.

(6)

Period	Number of Shares	Kind	Par Value
1/1/17 to 4/30/17	10,000	Common	$100.00
4/30/17 to 6/30/17	20,000	Common	100.00

Yours truly,

R/A

262 The witness was next asked whether Exhibit number 19, pages one and two, was received by him from John J. Gillin, Revenue Agent in Charge, on or about the date it bears, addressed to the Updike Grain Company, to which the witness answered: "Yes sir".

Mr. Ellick: We offer in evidence Exhibit number 19, pages one and two. Received without objection.

Exhibit number 19 received in evidence is as follows:

OFFICE OF
INTERNAL REVENUE AGENT
OMAHA DIVISION

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

November 24, 1919.

Updike Grain Company,
Omaha, Nebraska.

Gentlemen:

This office is in receipt of letter from the Commissioner of Internal Revenue, under date of November 20, 1919, relative to investigation of your income returns for the years 1913 to 1917, inclusive, made by Revenue Agent L. C. Smith, which advises as follows:

"An error exists in computing gross income in your amended figures for fiscal years ended July 31, 1915, and July 31, 1916. For 1915, gross income, $442,395.00, is understated by $5,000.00, and gross income for 1916, $609,459.54, is overstated by $5,000.00. Correcting these errors, additional tax due for 1915 and 1916 would be $145.81 and $3,015.53, respectively, and not $95.81 and $3,094.70 as shown.

"The additional tax due from the corporation for the eleven months ended June 30, 1917, $373,911.54, is correctly stated in your supplemental report of June 30, 1919.

"Since the corporation failed to file a claim for the refund of overpayment for 1913 amounting to $258.35, this office is barred by Section 252 of Revenue Act of 1918, in offsetting the amount against the additional taxes found to be due.

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"The overpayment for 1914 amounting to $113.01 will be offset against the additional tax $145.81 due for 1915, leaving a balance of $33.80 due for this year.

"A summary of additional taxes for years follows:

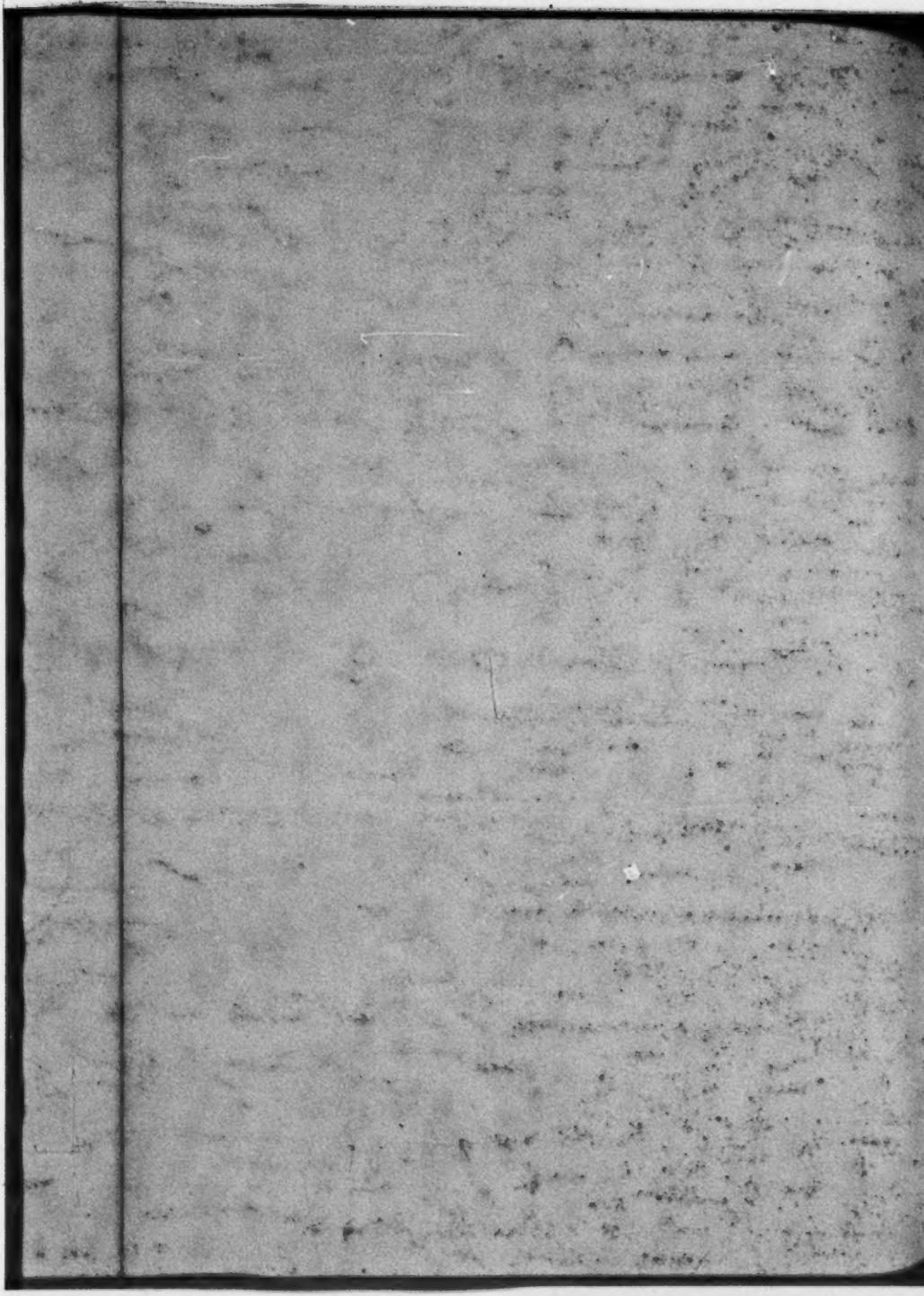
1915	$ 33.80
1916	3,015.53
1917,	373,911.54
Total,	$376,959.87 "

The Collector in your District will advise you as to the time and manner of payment of net additional tax.

MCW/D

Deputy Agent in Charge.

4-19-22



265 Calling the attention of witness Gorton Roth to Exhibits Numbers, 20, 21, 22, 23, 24, 25 and 26, he was asked if that was received by him from John J. Gillin on or about the date it bears, addressed to N. B. Updike, to which he answered "Yes sir, it was."

Mr. Ellick: We offer in evidence Exhibits numbered 20 to 26 inclusive, being the letter of John J. Gillin dated November 24, 1919, and a copy of the report of the Revenue Agent at that time.

The Court: "That is the L. C. Smith report?"

Mr. Ellick: "Yes, where they called it to the taxpayer's attention for the first time."

The offered exhibits were received in evidence, and are as follows:

OFFICE OF
INTERNAL REVENUE AGENT
OMAHA DIVISION

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

November 24, 1919.

Mr. N. B. Updike,
625 Grain Exchange Bldg.,
Omaha, Nebraska.

4 20

Dear Sir:

There is enclosed, as requested by your Mr. Roth today, two copies of the following, as shown by the files of this office, in reference to the investigation of the Updike Grain Company:

Amended Return, as made up by the investigating officers for the year 1913 and the fiscal years 1914, 1915, 1916 and 1917;

Synopsis of Amended Return for Excess Profits for the fiscal year 1917; and

Revised Tax Computation for the fiscal year 1917, in accordance with Department letter.

Respectfully,

MJH/D

Revenue Agent In Charge.

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A M E N D E D R E T U R N S

1913 - Amended Return.

Item 3,		$105,136.03
4	$45,939.42	
6a	10,063.55	
7	697.66	56,699.63
Net Income,		$ 48,436.40
Net Income reported,		74,351.38
Excessive net income reported,		$ 25,834.98
Refund due, - - - - - - - -		$ 358.35

4 21

Differences:

The original return was for the period July 1, 1912, to July 1, 1913.

As the company had no permission at that time to render a return on the fiscal year basis, it was necessary to adjust the items of income and deductions, to the calendar year by deducting one-half of the gross income and deductions reported, and adding the gross income and deductions from July 1 to Dec. 31, 1913.

Amended Return
Fiscal Year ending July 31, 1914.
(7 Months' Business)

Item 3		$ 38,918.16
4	$30,234.87	
6a	4,915.58	
7	593.67	35,734.13
Net Income,		$ 13,184.04
Net Income reported,		24,484.64
Excessive net income reported,		$ 11,300.60
Refund due, - - - - - - -		$ 113.01

Differences:

The original return was for the period July 1, 1913, to July 31, 1914, instead of for the 7-months' period ending July 31, 1914. It was necessary to adjust the gross income and deductions to this basis, using 7/13 of the items reported.

Amended Return
Fiscal Year ending July 31, 1915.

Item 3		$443,295.00
4a	$158,617.18	
b	4,650.00	
5a	318.17	
b	37,473 30	
6a	45,583.63	
7	5,103.33	251,745.61
Net Income,		190,549.39
Net Income reported,		180,968.70
Additional net Income,		$ 9,580.69
Additional tax, - - - - -		$ 95.81

Differences:

The original return was for the period July 31, 1914, to June 30, 1915. It was necessary to adjust the income and deductions to the fiscal years designated, by adding the income and deductions for July 1915, determined by taking 1/12 of the gross income and deductions of the fiscal year book closing for the period from June 30, 1915, to June 30, 1916.

Amended Return
Fiscal Year ending July 31, 1916

Item 3,		$809,459.54
4	$180,378.95	
5a	930.38	
6a	58,794.47	
7	6,401.71	446,405.51
Net Income,		$363,054.03
Net Income reported,		174,968.30
Additional net Income,		$188,085.73

Tax @ 1%,	$3,630.54
Additional tax @ 2%	2,117.82
Total tax liability,	$5,748.36
Total tax paid,	2,653.66
Additional tax due, - - - - -	$3,094.70

There appears to be an error in the computation of the additional assessment at 2% shown on the abstract of return for this year.

Differences (1916):

The original return was for the period June 30, 1915 to June 30, 1916. It was necessary to adjust the gross income and deductions to the fiscal year designated, by deducting the income and deductions for July 1915 and adding that of July 1916, determined by taking 1/12 of the total gross income and deductions as shown by the book closings for the fiscal years ending June 30, 1916, and June 30, 1917.

Fiscal Year Ending June 30, 1917.

Copy of Return.

Item 1,			$2,000,000.00
2			1,009,671.91
3a		$3,036,898.56	
c		56,352.36	
d		643,791.55	
e		116,657.66	$3,853,600.13
4a	$375,468.56		
5a	1,377.06		
6a	98,308.35		
7	6,657.09		481,603.08
Net Income,			$3,371,997.05
Tax @ 2%, - - - - -			$ 47,439.94

Amended Return.

Item 1,			$2,000,000.00
2			1,012,771.91
3a		$1,867,157.01	
c		51,564.67	
d		590,143.26	
e		106,936.19	$3,615,800.13
4	$344,177.70		
5a	1,170.64		
6a	90,018.82		
7	6,102.33		441,469.49
Net Income,			$3,174,330.64
Less Dividends (3rd)			590,143.26
Income less dividends			$1,584,188.38

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(1917 Amended Return Cont.)

Income less dividends (brought forward)		$1,584,188.38
6/11 - 1917 Proportion,		864,108.75
Less Excess Profits Tax,		459,081.32
Taxable at 4%		405,031.43
Excess Profits Tax,		$459,081.32
Income Tax @ 3%		34,304.99
Income Tax @ 4%		16,300.86
Total tax liability,		$509,587.17
Total tax paid:		
Income tax,	$47,439.94	
Ex. Profits tax,	96,583.62	144,023.56
Additional tax due, - - - - -		$365,564.61

3% tax on net income for fiscal period less EPT 1917 portion.

Differences:

The original return included the business from June 30, 1916, to June 30, 1917, as per book closings of those dates. The end of the fiscal year was re-designated as June 30, and the company given permission to make return on that basis, and the return should have included only eleven months' business from July 31, 1915, to June 30, 1917. It was necessary to adjust the gross income and deductions to that period by eliminating the income and deductions for July 1916, determined by taking 1/12 of the total gross income and deductions of the book closing for the period June 30, 1916, to June 30, 1917.

RETURN FOR FISCAL YEAR (11 months) ENDING 6-30-17

SYNOPSIS OF AMENDED RETURN.

	Invested Capital.	Net Income.
1911	$1,101,771.11	$ 58,358.73
1912	1,007,324.06	5,367.47
1913	1,131,334.89	None
Totals,	$3,240,430.06	63,726.19
1917, 1/12ths,	933,740.81	$1,584,188.38

Percentage of pre-war earnings to invested capital,	2%
Percentage used in computing deduction,	7%
7% of 11/12 of Invested Capital taxable year,	$ 65,361.86
11/12 of Specific Deduction,	2,750.00
Total deductions, - - - -	$ 68,111.86

Computation of Tax.

15%	$140,061.13	$68,111.86	$ 71,949.26	30%	$14,389.85
30 to 20%	46,687.04		46,687.04	35%	11,671.76
20 to 25%	46,687.04		46,687.04	35%	16,340.46
35 to 33⅓	74,699.26		74,699.26	45%	33,614.67
Over 33⅓	1,276,053.92		1,276,053.92	60%	765,632.35
	$1,584,188.38	$68,111.86	$1,516,076.53		$841,649.09

6/11ths of tax for period Jan. 1 to June 30, 1917, $459,081.32

Difference in Invested Capital

Invested Capital, 1917 Reported,	$3,100,844.05
Invested Capital, 1917 Revised,	1,018,626.34
Difference,	$1,082,217.71
Invested capital reported included $1,000,000 stock dividends issued April 30, 1917, out of fiscal year 1917 earnings,	1,000,000.00
Invested Capital reported included average amount of stock in other companies in excess of average indebtedness,	279,884.12
	$1,279,884.12
Less July 1916 earnings, not included in invested capital reported,	197,666.41
Net difference, - - - - -	$1,082,217.71

331

Revised Tax Computation

Net Income revised,		$3,174,330.64
Less Excess Profits tax,		459,081.32
Amount subject to 3% tax,		$1,715,249.32
Net Income revised,		$3,174,330.64
Less Dividends,	$590,142.26	
	459,081.32	1,049,223.58
Balance,		$1,125,107.06
Subject to 4%,		$ 613,694.75

Excess Profits tax,		$459,081.32
Tax at 3%		34,304.97
Tax at 4%		24,547.79
Total tax liability,		$517,934.10
Total tax paid;		
Income tax,	$47,439.94	
Ex.Prof.Tax,	96,582.62	144,022.56
Additional tax,		$373,911.54
Additional tax previously reported,		365,564.61
Additional tax due,.....		$ 8,346.93

c/ 26

273 The attention of the witness, Roth, was next called to Exhibit number 27, and he was asked to state if that is a notice he received from the Collector of Internal Revenue respecting the taxes claimed in this action dated July 16, 1921. That is, the Updike Grain Company, to which he answered: "Yes sir, it is". It was received on or about that date.

Mr. Ellick: We offer in evidence Exhibit number 27. That is on form 1-17-A. Witness excused.

Exhibit number 27 received in evidence is as follows:

INCOME, WAR-PROFITS, AND EXCESS-PROFITS TAX

NOTICE AND DEMAND FOR TAX

Form 1-a-Revised Jan., 1920

UNITED STATES INTERNAL REVENUE SERVICE

OLD BALANCE	DATE	TAX	AMOUNT PAID	BALANCE DUE	REMARKS
373811.54 43564.96 Interest.				373811.54 43564.96 Int. 417476.50	Jan (1920) P-14-I-3 Claim for abatement rejected by Comm- Int. Rev.

Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within ten days after date of this notice, the Act provides that a penalty of 5 per cent of the amount of tax due will be added, plus interest at the rate of 1 per cent per month, from July 26,1921 until paid.

Date July 16,1921

Updike Grain Company,
612 Grain Exchange Bldg.,
Omaha, Nebraska.
Jan (1920) P-14-I-3

To avoid penalty and interest this tax must be paid to the Collector of Internal Revenue at Omaha, Nebraska not later than July 26,1921

Date

To the Collector of Internal Revenue:

I inclose herewith the sum of $

in payment of the tax shown above.

Name Updike Grain Company,

Address 612 Grain Exchange Bldg., Omaha Nebr.

COLLECTOR'S PAID STAMP

4127

RETURN THIS FORM WITH REMITTANCE

275 Examined

By Mr. Ellick:

JAMES J. DRAKEFORD, called as a witness for the defendants, being first duly sworn, testified that he is Revenue Agent in Charge located at Omaha, Nebraska, of the Bureau of Internal Revenue, and that he has charge of the files and records of his predecessor, John J. Gillin. That he has not in his files the directions that were sent to John J. Gillin in the Fall of 1919 to audit certain returns of the Updike Grain Company that was referred to in the testimony of L. C. Smith. "That kind of correspondence is not kept over two or three years." Witness never saw those particular instructions but has seen similar instructions, and "we often issue similar instructions." In other words, we have a return for 1924 and check up 1924, 1925 and 1926 very often, or one at a time. Witness is familiar with the handling of returns in the Bureau of Internal Revenue and was at one time connected with the Washington Bureau. Witness' attention being called to the fact that on these returns that have been offered in evidence there is a rubber stamp "Return audited", testified that the auditor in the final audit, whoever handles that, puts his stamp on and that shows it has been audited and approved. That is all. At that time this was put on in the Bureau of Internal Revenue at Washington. Under present procedure those are audited in our office and sent down. Accepted by the Field office. Witness excused.

Examined

By Mr. Ellick:

GORTON ROTH, recalled as a witness for the defendants, was further examined by Mr. Ellick:

Witness' attention being called to Exhibit number 13, which is the letter to George L. Loomis, dated December 18, 1917, requesting supplemental blanks for the Updike
276 Grain Company, witness stated that he received the form 1031 revised pursuant to that letter, upon which he made the final return of the Updike Grain Company which he filed in January, 1918.

Copy of the report of L. C. Smith and the other letter of the same date which has just been identified as Exhibits numbers 20 to 26, inclusive, enclosed in the letter of November 24, 1919, were shown to Mr. Updike and were examined by witness.

Witness' attention was called to Exhibit number 28, being a letter from A. B. Allen, Collector of Internal Revenue, to N. B. Updike under date of May 8, 1923, and testified that that letter was received by Mr. Updike on or about the date it bears.

Mr. Ellick: We offer in evidence Exhibit number 28.

Mr. Blaisdell: Plaintiff objects to the offer of Exhibit number 28 for the reason that it is absolutely immaterial and irrelevant to any issue in this case and merely encumbers the record.

Complainant's objection was overruled and an exception duly allowed.

Exhibit number 28 was received in evidence over complainant's objection and is as follows:

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA

IN REPLYING REFER TO

May 8,1923.

Mr. N. B. Updike,
Grain Exchange Bldg.,
Omaha, Nebraska.

My dear Mr. Updike:

Under date of April 27, 1923, I addressed a letter to the Commissioner of Internal Revenue, Washington, D. C., asking for instructions as to procedure in the settlement of a number of cases in which you are interested involving additional taxes, particularly cases relating to the Updike Grain Company, Missouri Valley Elevator Company, Arlington Lumber and Grain Company, and Hynes Elevator Company.

I stated to the Commissioner the pertinent facts relating to these cases, and under date of May 2, 1923, I have a reply from H. F. Mires, Acting Deputy Commissioner, in which he acknowledges receipt of my letter of April 27th, and says in substance that in view of the fact that the corporations referred to were all dissolved and the respective assets distributed among the stockholders, etc., he has requested the Solicitor of Internal Revenue to prepare an opinion relative to the matter and upon receipt of said opinion, he, (the Commissioner), will communicate with me again.

Very truly yours,

A. B. Allen
Collector.

ABA-MH

278 Attention of witness Roth, was called to Exhibit number 29, and he testified that that letter was received from D. H. Blair, Commissioner, addressed to Mr. Updike under date of February 12, 1924. It was received on or about the date it bears.

Exhibit number 29 was offered and received in evidence without objection and is as follows:

TREASURY DEPARTMENT

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

ADDRESS REPLY TO
COMMISSIONER OF INTERNAL REVENUE
AND REFER TO

WASHINGTON

FEB 12 24

SOL:C:GAB
197104

Mr. N. P. Updike,

Omaha, Nebraska.

Sir:

I have considered the proposition submitted by you in behalf of Updike Grain Co., Missouri Valley Elevator Co., Arlington Lumber & Grain Co., and Hynes Elevator Co., Omaha, Nebraska, on the 25th day of May, 1923, through the Collector of Internal Revenue at Omaha, Nebraska, for a compromise of their liabilities on account of unpaid additional corporation income and excess profits tax for fiscal 11-month period ended June 30, 1917, assessed against the Updike Grain Co. in the amount of $373,911.54, with penalty and interest; for fiscal 10-month period ended May 31, 1917, assessed against the Missouri Valley Elevator Co. in the amount of $34,561.92, with penalty and interest; for fiscal 10-month period ended May 31, 1917, assessed against the Arlington Lumber & Grain Co. in the amount of $1526.47, with penalty and interest; and for fiscal 11-month period ended June 30, 1917, assessed against Hynes Elevator Co. in the amount of $23,915.39, with penalty and interest, and have decided to reject the same.

The case will proceed as if no offer had been made.

Respectfully,

D. H. Blair

Commissioner.

xx

429

280 Referring to the income tax return prepared by L. C. Smith on form 1031 revised, January, 1918, and form 1103, which is attached to government's exhibit number 2, the witness, Roth, testified that the originals of those returns were not presented to him for signature by Mr. L. C. Smith, and that he, the witness, never saw the originals at any time.

Mr. Updike was also interested in the Arlington Lumber and Grain Company, which was dissolved just a little before the Updike Grain Company; witness thinks it was the early part of August or the latter part of July, 1917. The Arlington Lumber and Grain Company did business on a fiscal year basis, "the same as the Updike Grain Company." Returns were made for that company on the same form that they were made for the Updike Grain Company. Witness made no additional returns for the Arlington Lumber and Grain Company upon forms 1031 or 1103 or 1095, revised, January, 1918; made no report after the October 3, 1917 Act was passed."

L. C. Smith did not make an audit of the Arlington Lumber & Grain Company at the time he made the audit of the Updike Grain Company. No field audit was made of that company under the October 3, 1917 act, but the Government computed, determined and assessed an additional tax against the Arlington Lumber & Grain Company under the October 3, 1917 act.

Cross-Examination

By Mr. Blaisdall:

When witness spoke of these returns that were made for the Arlington Lumber and Grain Company and some of those other corporations, witness refers to returns that were made under the 1916 Act and the Act of March 3, 1917.

No returns were ever asked for from any of the Updike corporations under the October 3, 1917 act, and no re-
281 turns were filed for the Updike Grain Company after the act of October 3, 1917, was passed, covering the fiscal period ending June 30, 1917, except the blank and the letter on March 26, 1918, which is Exhibit 1. When L. C. Smith furnished his audit of the Updike Grain Company I did not see the blank forms of return which he filled out and prepared and put some figures on; he never showed them; he did not present them to me. The other Updike corporations I referred to were the Arlington Lumber & Grain Company, Missouri Valley Elevator Company and Updike Elevator Company. They all had fiscal years ending the same

time as the Updike Grain Company, and filed exactly the same thing.

Redirect Examination

By Mr. Ellick:

When L. C. Smith came to the office of the Updike Grain Company and to my office for the purpose of making the audit that has been referred to in his report of October 25, 1918, he said he wanted to audit our returns covering 1913 down to 1917. Witness furnished him the necessary books to make these audits, everything he asked for. He told us he had no information on the 1917 return and asked us if we had copies of our returns. I told him we did and furnished them to him. They were copies of the returns, Exhibit 7, pages 1 and 2, Exhibit 8, Exhibit 9 and Exhibit 14, pages 1 and 2. The first time that any Government official ever asserted that returns had not been filed under the October 3, 1917 act was when the Missouri Valley Elevator case came up for trial in this court. That was in June, 1924.

Examination

By Mr. Ellick:

NELSON B. UPDIKE, witness for defendants, being duly sworn, testified that he is one of the defendants in this case and that he was President of the Updike Grain Company up to the time of its dissolution in August, 1917. Witness
282 heard the testimony of L. C. Smith and Gorton Roth with reference to the returns that L. C. Smith made at the time he made an audit of the books in October, 1918.

L. C. Smith did not at that time present to witness any income tax return for signature of witness, nor did witness see any income tax return prepared by L. C. Smith at that time.

Shortly after the receipt of Exhibit 28, being a letter dated May 8, 1923, I received a telephone communication from Mr. Allen saying he wanted to see me down at his office about the collection of these various taxes. I went to his office pursuant to that communication and he stated that these cases had been dragging along for some time and suggested that we offer a compromise. Not only this case but several others. And I told him that any offer that I would make in compromise would be so small that really it would probably be insulting, and I rather objected, but he kept on and finally said you ought to make an offer of an amount that would be around about what it might cost you to defend this in case of a law suit and I said, well, I said, if you will consider an offer along those lines I will make one. And he

said he would. And, I offered him ten thousand dollars. He had another man with him in consultation, and they consulted with each other after I made the offer and both agreed that they would approve the offer. And then they asked me for a check. Well I says, I don't like to do this without seeing my lawyers. Well they said there was only one thing to do, just write a check, and you have to sign a regular blank form, and so I signed the blank form and gave,—not the blank form but signed the form filled out and then gave them a ten thousand dollar check with the understanding that they would not cash the check unless it was accepted in full for the claim. That I did not,—I told him I did not want to pay ten thousand dollars and then have it endorsed as part
283 payment of the claim. And he accepted it in that way, and an offer of compromise was filled in by Mr. Allen or someone in his office upon a form Mr. Allen had which is the offer of compromise that is attached to the answers of D. H. Blair to the original interrogatories. The check for $10,000.00 that I gave Mr. Allen that day was cashed about six or seven days afterwards. I got no receipt from the Government for that $10,000.00. I made requests upon Mr. Allen for a receipt or evidence that the tax had been settled the day I got the check back from the bank, as quick as I knew the check was back from the bank, and kept repeating the request about once a month for nine months and got the same answer every time. Allen told me that he could not give us a receipt but that we would get one in due time and that the tax was settled and that he had never been turned down in a single case on any compromise that he had ok'd and that I could rest assured that the taxes were all settled. I finally got notice that the offer in compromise was refused, as shown by Exhibit 29, dated February 12, 1924, but did not get my money back until about eight or nine months or maybe a year after I found out they had finally refused it.

I first learned that the Government was claiming that the returns that had been filed in 1917 of the income of the Updike Grain Company for the fiscal period ending June 30, 1917 were not accepted as returns under the October 3, 1917 act about the close of the trial of the Missouri Valley Elevator Company case, or after that, I am not sure whether that came up during that case or not. They admitted we had filed a return and said they were filed and all that, and then after that they came along and said there were no returns at all.

Cross-Examination

By Mr. Blaisdell:

284 Besides the Updike Grain Company witness was in
terested in the Missouri Valley Elevator Company, th
Updike Elevator Company and the Arlington Lumber an
Coal Company.

It was stipulated that the court will take judicial notic
of regulations of the Treasury Department and the Burea
of Internal Revenue, which are put out by the Treasury De
partment in published documents, and that no proof of the
need be made. Thereupon the court announced he woul
also take judicial notice of reports of the committees of Co
gress.

Redirect Examination

By Mr. Ellick:

The witness was asked: "The government proceede
against you in the Updike Elevator case and the Arlingto
Grain Company case under Section 280, before the Board
Tax Appeals." to which the witness answered: "Yes sir.
Witness excused.

Mr. Ellick: The defendants offer in evidence that pa
of Volume 67, No. 43, Congressional Record, 69th Congres
first session, Dated Friday, February 5, 1926, appearing
page 3068 as follows:

"Mr. Reed of Pennsylvania. Now, Mr. President, I a
consideration of the committee amendment at the bottom
page 137.

The Vice-President. The amendment will be stated.

The Chief Clerk. On page 137, after line 23, the Co
mittee on Finance proposed to strike out:

(d) Where the assessment of the tax is made within t
period prescribed in section 277 or in this section, such t
may be collected by distraint or by a proceeding in cou
begun (1) within six years after the assessment of the ta
or (2) at any time prior to the expiration of a
285 period for collection agreed upon in writing by t
commissioner and the taxpayer.

(e) This section shall not effect any assessment mad
or distraint or proceeding in court begun, before the ena
ment of this act, nor shall it authorize the assessment of
tax or the collection thereof by distraint or by a proceedi
in court (1) if at the time of the enactment of this act su
assessment, distraint, or proceeding was barred by the peri

of limitation then in existence, or (2) contrary to the provisions of subdivision (a) of section 274.

And in lieu thereof to insert:

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior act of Congress has been made (whether before or after the enactment of this act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the commissioner and the taxpayer.

(e) This section shall not bar a distraint or a proceeding in court begun before the enactment of the revenue act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this act the commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this act.

286 Mr. King: That relates to fraud; does it not?

Mr. Reed of Pennsylvania: Yes.

The Vice President: The question is on agreeing to the amendment.

The amendment was agreed.

Over objection of the complainant the document offered was received in evidence.

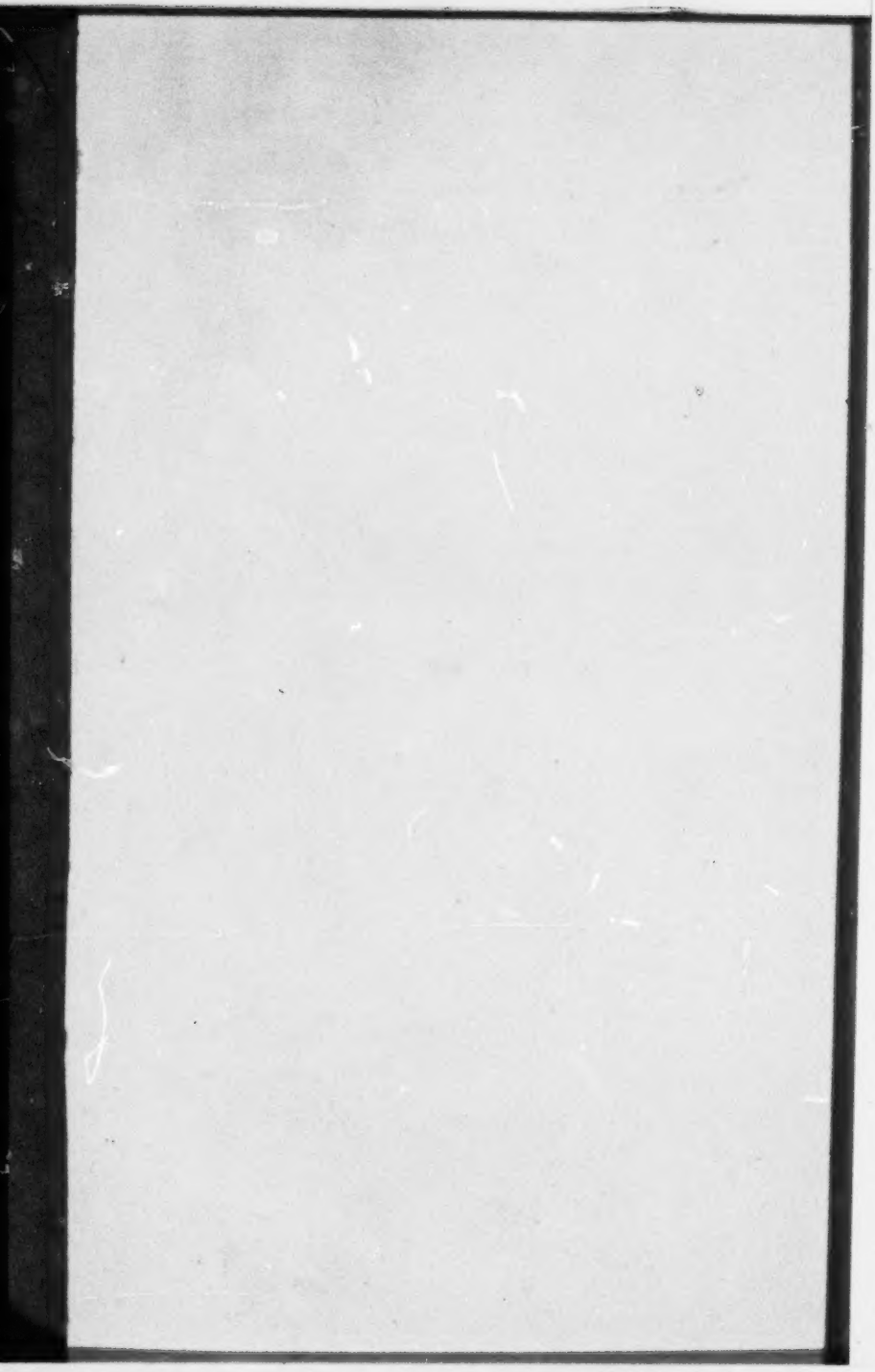
Mr. Ellick: Defendants offer in evidence the petition filed in this court by the United States of America against Nelson B. Updike and others known as in Equity Number 651. Filed April 12, 1924, in the case which we have been terming here as the Missouri Valley Elevator Company case.

Mr. Kinsler: The offer is objected to because it is not relevant to any issue in this case, it is not material and it is not competent, and for the further reason that this petition set up the returns of Missouri Valley Elevator Company under the provisions of the Revenue Act of September 8, 1916, and March 3, 1917 as the returns,—apparently as the

only returns that were required by the Revenue Act of October 3, 1917, and because it was held both in this court and by the Circuit Court of Appeals that so much of the pleadings which is now offered in evidence as set up this return pleaded was absolutely immaterial and because the Circuit Court of Appeals in the former Updike case reported in Volume 8 of the Second Edition of the Federal Reporter at page 913 has expressly held not only that so much of this pleading as set up those returns was absolutely immaterial and should be disregarded but that the evidence offered relating to them,—to this part of the petition should be disregarded.

The Court overruled complainant's objection to the offer, to which complainant at the time duly excepted. The petition was received in evidence, although the trial Judge said
287 "In my opinion this is not admissible. * However, notwithstanding that is my opinion I will overrule the objection".

The Petition, being Exhibit Number 30, is as follows:



IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION.

UNITED STATES OF AMERICA,)

Complainant,)

vs.) In Equity No. 651

NELSON B. UPDIKE, ELMER A. COPE,)
EDWARD UPDIKE, OTIS M. SMITH,)
GORTON ROTH and ROBERT B. UPDIKE,)

Defendants.)

BILL OF COMPLAINT.

To the Honorable Judge of the District Court of the United States for the District of Nebraska, Omaha Division.

The complainant by its Attorney, James C. Kinsler, United States Attorney for the District of Nebraska, Omaha Division, complains of the above named defendants and respectfully shows to the court:

I.

That at all times hereinafter mentioned the complainant was, and now is, a corporation sovereign and body politic.

II.

That at all times hereinafter mentioned the defendants, Nelson B. Updike, Elmer A. Cope, Edward Updike, Otis M. Smith, Gorton Roth and Robert B. Updike, were, and now are, citizens of the United States and of the State of Nebraska, and inhabitants of, and resident in, the Omaha Division of said United States District Court in the State of Nebraska within the jurisdiction of this court.

III.

This is a suit in equity brought by the United States of a civil nature arising under a law of Congress providing for internal revenue and the collection thereof.

IV.

Missouri Valley Elevator Company, hereinafter referred to as the "Corporation" was duly organized as a corporation on or about July 1, 1910, under the laws of the State of Nebraska, with a total paid-up capital stock of $150,000, having its principal office and place of business at the city of Omaha, in the State of Nebraska, and from said July 1, 1910, until on or about August 1 or 2, 1917, which was the date of its formal dissolution, as hereinafter described, said corporation was engaged in the business of receiving grain on consignment, storing, buying and selling and dealing in grain.

V.

The above named defendants were all the stockholders of the said corporation at the date of said dissolution and on and immediately before that date owned and held the following shares of stock of said corporation:

Nelson B. Updike	1,000	shares
Elmer A. Cope	10	"
Edward Updike	256	"
Otis M. Smith	150	"
Gorton Roth	3	"
Robert B. Updike	81	"
Total ...	1,500	shares

VI.

Pursuant to the provisions of the Act of Congress, approved September 8, 1916, entitled "An Act to increase the revenue, and for other purposes", hereinafter referred to as the Revenue Act of 1916, and the Act of Congress, approved March 3, 1917, entitled "An Act To provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extension of fortifications, and for other purposes", the said corporation by N. B. Updike, president, and E. A. Cope, treasurer, on or about the 24th day of July, 1917, filed with the Collector of Internal Revenue for the District of Nebraska a

corporation income tax return for ten months of its fiscal year beginning July 31, 1916, and ended May 31, 1917, and on August 29, 1917, they filed an excess profits tax return for the ten months of its said fiscal year, both returns purporting to be true and correct statements of the gains, profits and income from all sources received by and accrued to said corporation during the said ten months of its fiscal year ended May 31, 1917. Said corporation on the 21st day of July, 1917, duly paid to the Collector of Internal Revenue of the District of Nebraska the sum of $3,355.98, the amount of its income tax for said taxable period as shown by its said return, and on August 30, 1917, duly paid to the said Collector the sum of $5,838.52, the amount of its excess profits tax for said taxable period as shown by its said return.

On September 27, 1917, the said corporation by its above named officers filed with the aforesaid Collector of Internal Revenue its amended Excess Profits Tax Return for its said fiscal period from July 31, 1916 to May 31, 1917, showing a total amount of such tax assessable of $5,984.09 and paid an additional sum to said Collector on September 29, 1917, of $145.57, shown to be due by said amended return.

VII.

An Act of Congress entitled "An Act To provide revenue to defray war expenses, and for other purposes", was approved October 3, 1917, and is hereinafter referred to as the Revenue Act of 1917. This Act was H. R. 4280 and was passed by the House of Representatives on May 23, 1917, and on July 3, 1917 was reported to the Senate by the Finance Committee thereof, with such Finance Committee's amendments. Such bill was in part an amendment to the provisions of the said Revenue Act of 1916, in that it increased the normal and surtax rates of the latter Act and increased the War Excess Profits tax rates, provided in the said Act of March 3, 1917, and said Revenue Act of 1917 expressly provided that the rates of the above taxes should relate back to, and be effective from,

January 1, 1917. Said Revenue Act of 1917 expressly repealed Title II of the Revenue Act of March 3, 1917, relating to Excess Profits tax and provided "that any amount heretofore or hereafter paid on account of the tax imposed by such Title II [of Revenue Act of March 3, 1917] shall be credited toward the payment of the tax imposed by this title" [of Revenue Act of 1917].

VIII.

Said returns were incorrect, misleading and false in law in the respects hereinafter set forth.

IX.

Subsequent to the filing of said returns the Commissioner of Internal Revenue upon additional information and facts submitted to him directed a review and audit to be made of the income of said corporation for the said taxable period beginning July 31, 1916 and ending May 31, 1917, and as a result thereof the income, deductions and taxes as theretofore reported by the corporation in its said returns were corrected and redetermined. Said corrections and determinations were made, however, under and by virtue of the provisions of, and rates contained in, the aforesaid Revenue Act of 1917.

X.

Thereafter the Commissioner of Internal Revenue on or about the ____ day of November, 1919, duly assessed against the said corporation an additional tax in the sum of $34,561.92 for the said taxable period beginning July 31, 1916, and ending May 31, 1917; and by reason of the income so received by said corporation as aforesaid during the said taxable period aforesaid, the corporation under the provisions of the said Revenue Act of 1917 amending the aforesaid Revenue Act of 1916, became and now is indebted to the complainant for additional income and excess profits tax in the aforesaid sum of $34,561.92 and the said sum remains yet due and unpaid.

XI.

Complainant is advised and believes, and therefore avers the same to be the facts as set forth in this paragraph, that on August 1, 1917 a meeting of all the stockholders of the above named corporation was had, said stockholders being all the above named defendants to this bill and at said meeting it was unanimously voted that a deed of conveyance of all the real estate and elevator of the said corporation and a bill of sale of all the personal property of the said corporation be properly executed and delivered to Updike Grain Company and that the action of the board of directors [illegible] to dissolution of the corporation be "ratified, confirmed and approved" and that officers of the corporation were authorized and directed to execute the necessary certificate of dissolution and to file the same in the appropriate office. Said certificate of dissolution, after having been duly sworn to by W. F. Updike, president, and [illegible] Smith, secretary, on August 1, 1917, was duly filed in the office of the Secretary of State of the State of Nebraska on August 2, 1917, and was therein duly recorded in said office in Book 32, Miscellaneous Incorporations, at page 8.

XII.

Immediately prior to said dissolution, as the complainant is advised and believes, and therefore avers to be the fact, the said corporation received in cash from Updike Grain Company, a corporation, the sum of $60,000 as the consideration for which by due and legal proceedings it sold, transferred and conveyed to it its elevator and realty. This payment of cash added to its then cash on hand made an aggregate sum of $150,000 as cash assets of the corporation, which last mentioned sum was forthwith and prior to the date of its formal dissolution by it distributed amongst its stockholders, the above named defendants, ratably according to their stock holdings of its shares of stock. By reason of the said dissolution and distribution of all the assets and the property of the said corporation as aforesaid to and amongst its stockholders as hereinbefore set forth, the corporation was left without money, assets or property of any kind

with which to pay the said taxes due and owing to the United States, hereinbefore specifically set out, and the defendants, and each and every of them received as stockholders of said corporation the entire money, assets and property of the said corporation as distributees charged with a trust in favor of the United States to the extent of the said taxes due and unpaid by it as hereinbefore set forth.

XIII.

The complaintant has no clear, adequate or complete remedy at law against either the Missouri Valley Elevator Company or the defendants herein, and, therefore, brings this suit.

XIV.

The Commissioner of Internal Revenue authorizes and sanctions these proceedings.

WHEREFORE, in consideration of the facts herein stated complainant being without a clear, adequate and complete remedy at law, comes before this court and prays:

1. That it be decreed that such part of the corporation's money and assets distributed to defendants on the dissolution aforesaid, as shall be sufficient to pay in full the above described complainant's claim and demand, together with interest thereon at legal rate from the date when said claim against said corporation became legally due and the costs of this suit are by said defendants held in trust to pay the same and that defendants be required to account for the same.

2. That upon such accounting defendants be required to pay to complainant, to the extent that each of them has received the money and assets of said corporation, an amount sufficient to discharge the aforesaid claim and demand of complainant, together with interest thereon at legal rate from the date when said claim and demand became legally due.

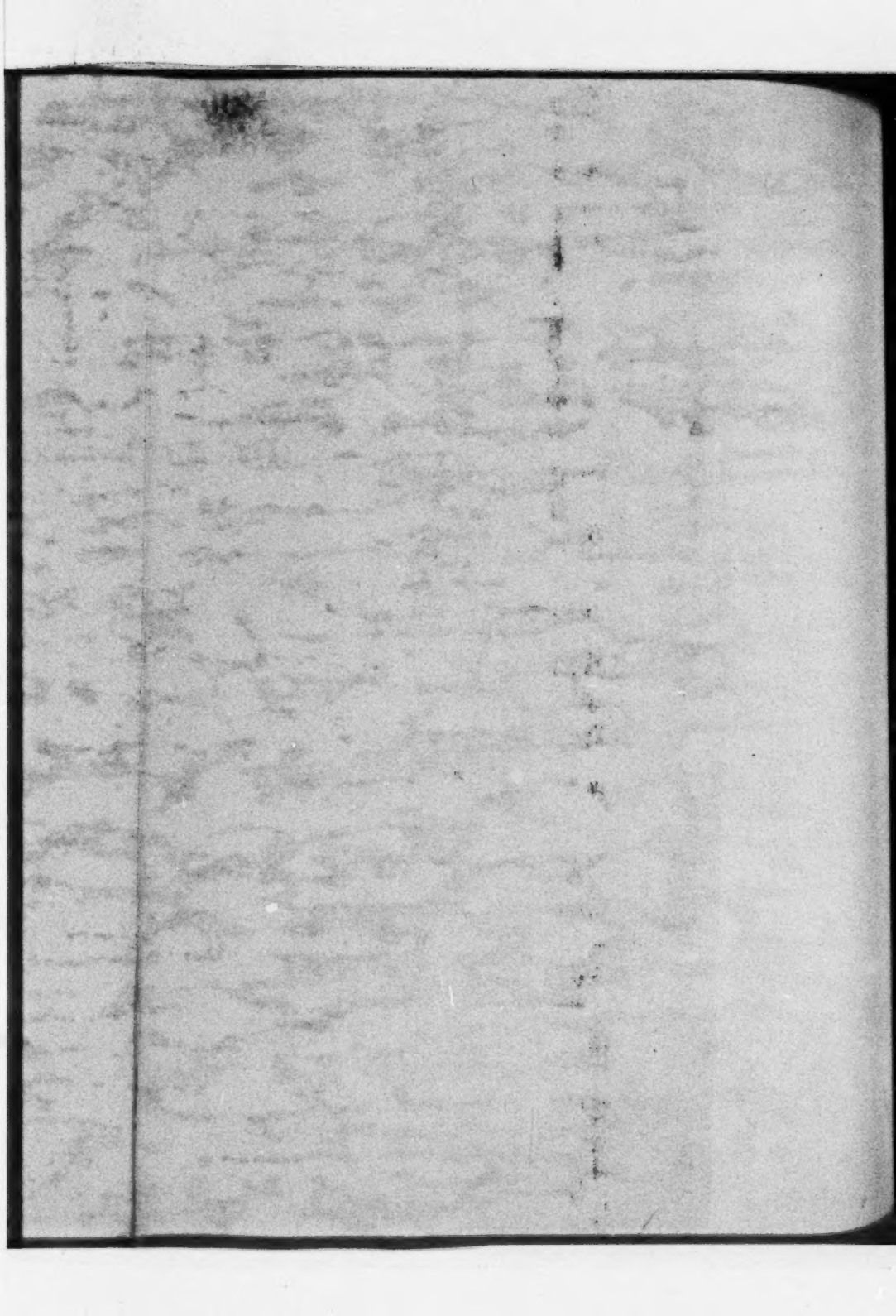
3. That complainant have such other, and further, and general relief as is just and equitable as well as a decree for costs.

And may it please the Court to grant unto the complainant a writ of subpoena to the United States of America issued out of and under the seal of this Honorable Court directed to the above named defendants and commanding them on a day certain and under certain penalties therein expressed, personally to appear before this Honorable Court then and there to answer all and singularly the premises, and to stand to and perform and abide by such orders, directions and decrees as may be made against them in the premises, and complainant will ever pray, etc.

James C Kinsler

United States Attorney
District of Nebraska, [redacted].

Attorney for Complainant.



295 Nelson B. Updike being recalled as a witness, testified as follows:

Witness was asked the following question: "Mr. Updike, did you ever give any consent in writing or otherwise or any waiver extending the time within which the Government might proceed against the Updike Grain Company or against you for the collection of this tax?

Complainant objected to the question as immaterial and not within the issues. The Court overruled the objection and complainant was allowed an exception.

The witness answered: "No."

Witness was next asked: "Did you, as an officer of the Updike Grain Company, ever enter into any agreement or consent or sign any waiver with the government extending the time within which the government might proceed against the Updike Grain Company or against any of the stockholders of that corporation for the collection or assessment of this tax?"

Complainant objected to the question as wholly immaterial and not within the issues. The Court overruled the objection and complainant was allowed an exception.

The witness answered: "No."

Witness was next asked: "You have had entire charge of this matter?", to which witness answer "Yes sir." Witness was next asked: "And looked after the interests of the other stockholders who held an interest at that time in the Updike Grain Company?", to which witness answered: "Yes sir". Witness was next asked: "Have you any consents or waivers in writing, or otherwise, been made or entered into or filed by any of the defendants in this case extending the time for the collection or assessment of
296 this tax?", to which question complainant objected as wholly immaterial. The objection was overruled and complainant allowed an exception. The witness answered: "Not that I know of".

Examination

By Mr. Ellick:

I. R. Blaisdell, one of the attorneys for complainant, was called as a witness by defendant, and being duly sworn was examined in chief by Mr. Ellick.

Witness was asked: "Mr. Blaisdell, you have in your possession the entire file of this claim against the Updike Grain Company and the stockholders of the Updike Grain Company?", to which witness answered: "I have the files as far as I know." "The entire file".

Witness was next asked: "Showing all of the proceedings in that matter?", to which witness answered: "Well, I don't know just what you mean. What I have is the correspondence file from the General Counsel's office, merely the file showing letters received and copies of letters, telegrams sent, copies of the pleadings, and I have what I call blank tax reports, administrative file which contains things that have been filed and returns which were all filed under the Act of 1917, returns on No. 1095 filed under the Act of March 3rd and some correspondence between the parties and the Commission." Witness was next asked: "There are copies in these files?", to which witness answered: "As far as I know."

Witness was next asked: "Were there any waivers or consents signed by the Updike Grain Company or any of these defendants extending the time within which the tax claimed in this action could be assessed or collected from the taxpayer?"

The question was objected to as being wholly immaterial and not within the issues.

297 The objection was overruled and complainant allowed an exception.

Witness then answered: "I have never seen any."

Witness has examined the entire file and no such consents or waivers appear in the file.

Cross-Examination

By Mr. Kinsler:

On cross-examination witness was asked: "Did you ever know of anyone signing a waiver where no return had been filed by the taxpayer?", to which witness answered: "No sir". Witness was next asked: "You never heard of that before?", to which witness answered: "No."

Defendants rest.

Government's Rebuttal.

Complainant now offered in evidence all of the interrogatories propounded to D. H. Blair, Commissioner of Internal

Revenue, T. F. Langley, Chief of Proving Section of the Income Tax Unit, Bureau of Internal Revenue, James J. Drakeford, Agent in Charge, Omaha, Nebraska, A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska, which had not been offered in evidence by the defendants, and complainant also offered in evidence all of the answers to these interrogatories which had not been offered in evidence by the defendants. Complainant also offered in evidence all of the additional interrogatories propounded to D. H. Blair, Commissioner of Internal Revenue, James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska, and A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska, that were not offered in evidence by the defendants, together with all answers to these additional interrogatories which were not offered in evidence by the defendants.

298 All of the original interrogatories, the additional interrogatories and all answers to the original and additional interrogatories offered in evidence by complainant were received without objection.

Original interrogatory number 19 propounded to Commissioner Blair was as follows: "State if the assessment against the Updike Grain Company of $373,911.54, was entered upon said assessment roll or list in the same manner and in accordance with the same practice that then prevailed, respecting assessments of a like nature against other taxpayers.", to which Commissioner answered: "It was. The assessment of $373,911.54 was made against the Updike Grain Company for its income and excess profits taxes imposed by the Revenue Act of October 3, 1917, as was usual in similar cases. In this case, Updike Grain Company failed to make or file any return under the Revenue Act of October 3, 1917, and no return was made by the Collector, Deputy Collector or Commissioner of Internal Revenue for taxes under said Revenue Act. Updike Grain Company having failed and refused to file a return under the Revenue Act of October 3, 1917, this office caused an investigation to be made of the books, records and papers of Updike Grain Company for the purpose of computing and determining the amount of income and excess profits taxes due from said company under the Act of October 3, 1917. The additional assessment was made upon information furnished by the Revenue Agent."

Original interrogatory number 39 propounded to Commissioner Blairs was as follows: "State from what data, records, information or documents the tax of $373,911.54 assessed

against Updike Grain Company for the fiscal period ending June 30, 1917, was computed, determined and as-
299 sessed." To which the Commissioner answered:

"Upon information furnished by reports of Internal Revenue Agent in charge at Omaha, Nebraska, as heretofore stated, which the agent obtained from the books and records of the Updike Grain Company."

In answer to original interrogatory Number 46, Commissioner Blair answered that he had in his possession or under his control the claim for abatement of the tax of $373,911.54 filed by the Updike Grain Company or the former officers thereof on or about February 19, 1920. And the Commissioner attached a copy of said claim for abatement to his answer, which is as follows:

2-1167-47 733 Jan. 9, 15 L 1

TREASURY DEPARTMENT,
U. S. INTERNAL REVENUE.
Form 47.—Revised April, 1918.
No. 200,000.

CLAIM FOR ABATEMENT

TAXES ERRONEOUSLY OR ILLEGALLY ASSESSED

DATE OF FILING TO BE PLAINLY STAMPED HERE

State of Nebraska,
County of Douglas } ss:

IMPORTANT
This claim should be forwarded to the Collector of Internal Revenue from whom notice of assessment was received.

1920 FEB 25 AM 9 25

Write Name as it can be easily read.

Updike Grain Company
(Name of claimant.)

612 Grain Exchange Building, Omaha, Nebraska.
(Address of claimant; give street and number as well as city or town, and State.)

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant Grain Business
2. Character of assessment or tax Additional tax 1917 income and profits tax
3. Amount of assessment Three Hundred Seventy-three Thousand Nine Hundred Eleven and 54/100 Dollars $373,911.54
4. Amount now asked to be abated Three Hundred Seventy-three Thousand Nine Hundred Eleven and 54/100 Dollars $373,911.54

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

Dissolution of the Updike Grain Company on August 31, 1917 by reason whereof it had no legal existence at the time of the taking effect of the Act of October 3, 1917. There is no provision in that Act for the levying of tax on the share-holders of dissolved corporations upon any other basis than that upon which other individuals are taxed, and the stockholders receiving the assets of the dissolved Company, have made their return and paid taxes on proceeds received by them as the result of such dissolution.

Prior to the dissolution of the corporation in pursuance of Article 85 of the Income Tax Regulations then in full force and effect, as supplemented by Ruling of March 22, 1917, the officers of the corporation retained from its assets, and paid, thereafter, Federal Income Tax and Excess Profits Tax for the fractional part of the year 1917, in pursuance of the final and fiscal returns duly made and filed in accordance with said Rulings.

All of which and additional reasons will more fully appear by the Affidavit of Gorton Roth, former Secretary of the said corporation, hereto attached, and marked Exhibit "A".

Sworn to and subscribed before me this 19th day of February, 1920

Elizabeth LaDoucheur
Notary Public
(Title.)

Signed:

Write Name as it can be easily read.

Gorton Roth

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue without charge.)

373,911.54

CERTIFICATE OF ASSESSMENT

I certify that an examination of the records of the Commissioner's Office shows the following facts as to the assessment and payment of the tax:

NAME AND ADDRESS.	CHARACTER OF ASSESSMENT OR ARTICLE TAXED.	PERIOD COVERED BY ASSESSMENT.	LIST.	YEAR.	MONTH.	PAGE.	LINE.	AMOUNT.
Updike Grain Co	R & A 6/30/1918	11 mos 6/30/17	736	1918	Jan	14	1	373911

LC

E. Norma
Assessment Clerk, Internal Revenue Bureau.

FORM 47

Abatement Order No. .....

District Nebraska

Income
(Nature of tax).

Claimant Updike Grain Co.

Address 625 Omaha Grain Exchange Omaha Neb

Examined and submitted for action ....., 19....

Claim examined by: LL

Claim approved by: SA

Chief of Division.

Amount claimed, $ 373,911.54

Amount allowed, $ None

Amount rejected, $ 373,911.54

COMMITTEE ON CLAIMS:

E W Balch

J C Rogers

M Watson
MCL

302 The seventh original interrogatory propounded to T. F. Langley was as follows: "After the assessments endorsed upon said return were computed and determined, state what course or routine said matter took in the Bureau of Internal Revenue, from the time said assessments were computed and determined up to and including the time of the endorsement of said assessments upon said return." To which the witness answered: "No assessment was endorsed upon said return. Upon the determination of the additional tax by the corporation audit division as above stated, the aforesaid return, together with a summary sheet showing the additional assessments to be made, was sent to the Proving Section of the Income Tax Unit, where the additional assessment list and the Commissioner's certificate were prepared. Said additional tax appeared upon the January, 1920 additional income tax list, page 14, line 1. Said list was signed by J. H. Callan, Acting Commissioner of Internal Revenue, under date of January 27, 1920. Thereafter a further notation was made upon said return indicating that said assessment had been made on the said January, 1920 list, page 14, line 1."

The witness was then asked, as appears by original interrogatory number 8: "Was the computation, determination and assessment of the taxes endorsed upon said return handled or made in the same manner as other income, war income and excess profits taxes assessed against other corporations, under like circumstances?" To which the witness answered: "The aforesaid assessment was not endorsed upon said return. The computation, determination and assessment of said tax was made according to the customary procedure prevailing in the Income Tax Unit."

A. B. Allen, Collector of Internal Revenue, answered additional interrogatory Number 9 as follows: "Orig-
303 inal form 53 forwarded to James R. Peat for transmittal to the Commissioner of Internal Revenue. This form is not prepared in duplicate. Therefore no copy of the form referred to above is on file in this office. Copies of correspondence by mail and telegraph regarding this matter hereto attached", and are as follows:

POSTAL TELEGRAPH – COMMERCIAL CABLES

CLARENCE H MACKAY, PRESIDENT

RECEIVED AT

Signal after the number of words—"Blue" indicates (Day Letter) "N.L." (Night Letter) or "Nite" (Night Telegram)

TELEGRAMS TO ALL AMERICA

CABLEGRAMS TO ALL THE WORLD

DELIVERY NO.

STANDARD TIME INDICATED ON THIS MESSAGE

Form 16

CHB233 65 GOVT 1 EXTRA

1927 FEB 4 PM 1 58

11

K WASHINGTON DC 4

COLLECTOR OF INTERNAL REVENUE

OMAHA NEB

REFERENCE ASSESSMENT THREE HUNDRED SEVENTY THREE THOUSAND NINE HUNDRED ELEVEN DOLLARS FIFTY FOUR CENTS ADDITIONAL INCOME EXCESS PROFITS TAXES AGAINST UPDIKE GRAIN CO FISCAL YEAR ENDED JUNE THIRTY NINETEEN SEVENTEEN APPEARING ON JANUARY NINETEEN TWENTY LIST PAGE FOURTEEN LINE ONE STOP THIS ASSESSMENT MUST NOT BE ABATED ON FORM FIFTY THREE AS SUIT FOR COLLECTION THEREOF IS ABOUT TO BE INSTITUTED AGAINST FORMER STOCKHOLDERS

BLAIR

COMMR.

Form 1206

CLASS OF SERVICE DESIRED	
Telegram	X
Day Letter	
Night Message	
Night Letter	

Patrons should mark an X opposite the class of service desired. OTHERWISE THE MESSAGE WILL BE TRANSMITTED AS A FULL-RATE TELEGRAM

WESTERN UNION TELEGRAM

NEWCOMB CARLTON, PRESIDENT — GEORGE W. E. ATKINS, FIRST VICE-PRESIDENT

Receiver's No.	
Check	
Time Filed	4 P. M.

Send the following message, subject to the terms on back hereof, which are hereby agreed to

Omaha, Nebraska, February 4, 1927.

12

Blair

Commissioner

Washington D C

Reference your wire today in re assessment against Updike Grain Company appearing on January Nineteen Twenty List Page Fourteen Line One stating that assessment must not be abated as suit for collection thereof is about to be instituted Stop Be advised Form Five Three was forwarded to Supervisor James R Peat for transmittal to your office January Seventh Nineteen Twenty-Seven

Allen

Official Business
Government Rate
Collect

Collector

IT:C:CC:1:MS?

RECEIVED
FEB 14 1927
DIST. OF NEBR.

Collector of Internal Revenue,

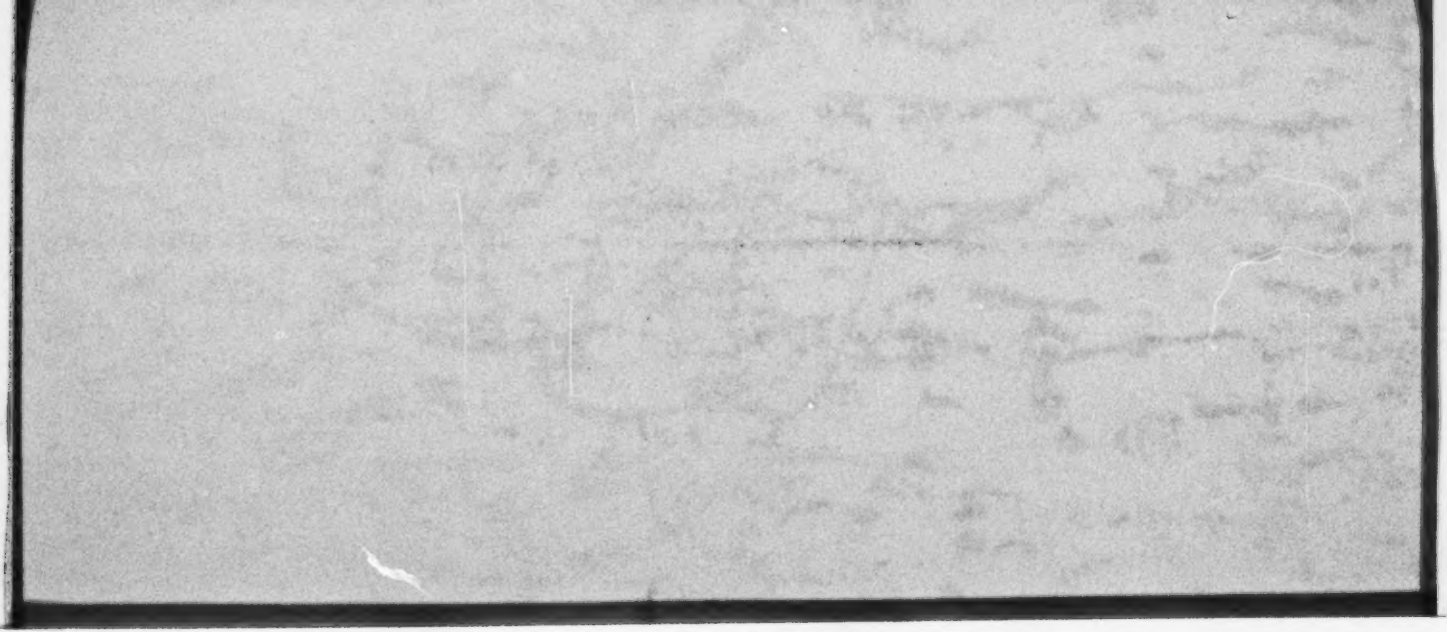
Omaha, Nebraska.

Reference is made to Form 53 submitted by you against the Updike Grain Co., Omaha, Nebraska, in the amount of $273,911.54 for the year 1917.

In this connection you are advised that this office has been informed by the Office of the General Counsel that a suit for collection is about to be instituted against the former stockholders of the taxpayer company, and in view of this information, the uncollectible claim has been rejected.

D. P. NASH,
Assistant to the Commissioner.

By
Head of Division



307 Letter from C. R. Nash to Collector of Internal Revenue Omaha dated December 31, 1926 [if] hereinbefore set forth.

Mr. Ellick: We wish to call the attention of the court at this time to the motions to dismiss complainant's suit filed by the defendants on February 29, 1928 and March 3, 1928, the hearing upon which was postponed by Judge Woodrough, until the trial of this case.

Whereupon the court after arguments and consideration of said motions and the evidence in support thereof, overruled each of said motions. To each of which rulings the defendants severally excepted.

It was agreed between the parties that the offering of proof by the defendants in support of the allegations in paragraphs 7 and 18 of the answer of Nelson B. Updike and the other defendants filed herein, and paragraphs 2 and 3 of the prayer in said answer may be deferred on account of the voluminous character thereof until it has been determined, if ever, that a liability exists upon behalf of the defendants or any of them for the taxes set forth in the amended bill of complaint of the complainant, and that the deferring of such proof shall not in any way prejudice the right of said defendants to offer said proof at any subsequent hearing of this cause before any final judgment shall have been entered herein against any of said defendants.

Complainant rests.

Defendants rest.

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308 Stipulation.

It is agreed between the parties to the above entitled action that the foregoing "Statement of the Evidence" contains all of the evidence offered and received on the trial of the above entitled action, together with all objections thereto, all rulings of the Court on said objections, and all exceptions allowed by the Court to said rulings. And that the foregoing "Statement of the Evidence" correctly shows the proceedings had on said trial, and is correct in all respects, and that it may be signed, settled, allowed and approved by the Court or by said presiding judge thereof, and that it may thereupon be filed in the office of the Clerk of said Court and

become part of the record for the purposes of the appeal of this action.

Dated at Omaha, Nebraska, this 16th day of May, 1928.

JAMES C. KINSLER,
Attorney for Complainant.

BROGAN, ELLICK & RAYMOND,
Attorneys for all above named Defendants except Ed P. Smith and George A. Roberts.

ED P. SMITH,
Attorney for Himself.

WARREN HOWARD,
Attorney for George A. Roberts.

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309 Certificate of Court or Presiding Judge to Statement of the Evidence.

I hereby certify that the foregoing "Statement of the Evidence" contains all of the evidence given or offered on the trial of said cause of the United States of America, Complainant, against Nelson B. Updike and others, Defendants, Number 853 Equity, in the United States District Court, District of Nebraska, Omaha Division, and correctly shows the proceedings on said trial, together with all objections to the evidence offered, all rulings on said objections, and all exceptions allowed to said rulings, and that said "Statement of the Evidence" is correct in all respects and is hereby settled, allowed and approved and made a part of the record on appeal herein.

Dated this 17 day of May, 1928.

By the Court:

THOS. C. MUNGER,
District Judge.

Statement of Evidence Lodged with Clerk, at Omaha, on May 1, 1928. R. C. Hoyt, Clerk. John Nicholson, Deputy.

Endorsed: Filed May 19, 1928. R. C. Hoyt, Clerk.

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310 Praecipe for Transcript of Record.

The Clerk of said United States District Court for the District of Nebraska, Omaha Division, is requested to prepare and transmit to the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, a Transcript of the Record in the above entitled action and include therein the following, namely:

1. Amended Bill of Complaint.

2. Amendment to Paragraph XIX of Amended Bill of Complaint.

3. Answer of Defendant Ed P. Smith.

4. Answer of Defendant George A. Roberts.

5. Answer of Nelson B. Updike and other defendants.

6. Motion of defendants to Dismiss Complainant's suit, filed March 3, 1928.

7. Order of July 9, 1927, granting defendants leave to propound interrogatories to D. H. Blair, Commissioner of Internal Revenue and others.

8. Order of December 21, 1927, granting defendants leave to propound additional interrogatories to David H.
311 Blair, Commissioner of Internal Revenue and others.

9. Trial proceedings commencing March 26, 1928.

10. Memorandum Opinion of Trial Judge.

11. Final order, judgment or decree dismissing plaintiff's suit filed April 13, 1928.

12. State of Evidence.

13. Assignment of Errors.

14. Notice of Appeal of May 1, 1928 and proof of service.

15. Petition for allowance of appeal.

16. Order of May 2, 1928, modifying and re-entering final decree of April 13 1928.

17. Order of May 2, 1928, granting plaintiff leave to refile Petition for allowance of appeal and Assignment of Errors.

18. Order allowing appeal.

19. Citation with proof of service.

20. Notice of appeal of May 2, 1928, with proof of service.

21. Notice of lodgment of Statement of Evidence with proof of service.

22. Praecipe for Transcript of Record and Clerk's Certificate of Transcript of Record.

JAMES C. KINSLER,
United States Attorney,
Attorney for Plaintiff.

District of Nebraska—ss.

I hereby certify and return, that on the 2nd day of May, 1928, I received this Praecipe for Transcript of Record, and on the 2nd day of May, 1928, I served the same upon the within-named Warren H. Howard, Attorney for the defendant George A. Roberts, at Omaha, in Douglas County, State and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

D. H. CRONIN,
United States Marshal for the
District of Nebraska.

By J. A. Davis,
Deputy United States Marshal.

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312 District of Nebraska—ss.

I hereby certify and return, that on the 2nd day of May, 1928, I received this Praecipe for Transcript of Record, and on the 3rd day of May 1928, I served the same upon the within-named defendant Ed. P. Smith, Attorney for himself, at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN,
United States Marshal for the
District of Nebraska.
By J. A. Davis,
Deputy United States Marshal.

District of Nebraska—ss.

I hereby certify and return that on the 2nd day of May, 1928, I received this Praecipe for Transcript of Record, and

on the second day of May, 1928, I served the same upon Brogan, Ellick and Raymond, Attorneys of record for all the defendants named in the caption of said Praecipe for Transcript of Record with the exception of the defendants, Ed. P. Smith and George A. Roberts, by delivering a certified copy of said Praecipe for Transcript of Record to Francis A. Brogan, Senior Member of said Law Firm at his office in the First National Bank Building in the City of Omaha, County of Douglas, State and District of Nebraska.

D. H. CRONIN,
United States Marshal for the
District of Nebraska.
By J. A. Davis,
Deputy United States Marshal.

Endorsed: Filed Mar. 3, 1928, R. C. Hoyt, Clerk.

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313 Praecipe for Additional Portions to Transcript of Record.

The Clerk of said United States District Court for the District of Nebraska, Omaha Division, is requested to incorporate into the transcript on appeal requested by complainant and appellant herein the following:

1. Motion of the defendants to dismiss the above entitled action, filed February 29, 1928.

2. Order of March 10, 1928, continuing hearing on motions of defendants to dismiss to the time of the trial.

3. Application of defendants for leave to file additional interrogatories and affidavit of A. G. Ellick, in support thereof, filed December 21, 1927.

F. A. BROGAN,
A. G. ELLICK,
ANAN RAYMOND,
ED. P. SMITH,
WARREN HOWARD,
Solicitors for Defendants and Appellees.

Service of foregoing praecipe accepted James C. Kinsler U. S. Atty.

Endorsed: Filed May 11, 1928. R. C. Hoyt, Clerk.

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314 (Clerk's Certificate to Transcript.)

United States District Court, District of Nebraska, Omaha Division.

United States of America,
District of Nebraska,
Omaha Division—ss.

I, R. C. Hoyt, Clerk of the District Court of the United States within and for the District of Nebraska, hereby certify that pursuant to and in compliance with the Praecipes, copies of which are found on pages 310 and 313 hereof, the foregoing record has been made. That the same are true and faithful Transcript of the pleadings and proceedings on file and of record in said Court, as mentioned in said praecipes and as indicated in the foregoing index, in the case of United State of America, vs. Nelson B. Updike, et al., Case No. 853 Equity, Omaha Division, and that copies of the Notices of Appeal and Citations, duly certified, have been lodged and remain in my office as such clerk.

Witness my hand and the seal of said Court at Omaha in said District this 22 day of June, A. D., 1928.

Seal
U. S. Dist. Court
Dist. of Nebr.
Omaha Div.

R. C. HOYT, Clerk.
John Nicholson,
Chief Deputy.

Filed Jun. 23, 1928, E. E. Koch, Clerk.

391–392 [Appearances of counsel omitted in printing.]

393–394 [Minute entry of argument and submission, Dec. 19, 1928, omitted in printing.]

395 In United States Circuit Court of Appeals
Eighth Circuit

No. 8241, January term, A. D. 1929

UNITED STATES OF AMERICA, APPELLANT

vs.

NELSON B. UPDIKE ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Nebraska

No. 8244, January term, A. D. 1929

NELSON B. UPDIKE ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Nebraska

396 Before KENYON, Circuit Judge, and JOHNSON and MCDERMOTT, District Judges

Opinion

Filed Mar. 21, 1929

MCDERMOTT, District Judge, delivered the opinion of the court.

This action was filed April 28, 1927, to impress a trust upon certain assets of the Updike Grain Company on account of taxes owing the Government, and to require the defendants to account for such taxes up to the value of the corporate assets received by them. The taxes in question are excess-profits taxes under the law of October 3, 1917, are for the taxable period ending June 30, 1917, and amount to $373,911.54. The corporation discontinued business June 30, 1917, and was formally dissolved August 27, 1927. Assets far in excess of the tax claimed were distributed to the stockholders, defendants herein; that is, Nelson Updike took over the property and accounted to the other stockholders for their share in cash. In January, 1920, an assessment was made against the corporation for this tax. The principal question involved is whether this action is barred by the statute of limitations.

Before considering the applicable statutes it must first be determined whether or not this is a "no-return" case. It is conceded that the corporation made no return under the October 3, 1917, act, that no officer of the corporation signed or swore to any return, and that, when requested to make a return the former secretary declined because the corporation was out of existence, had no property, and owed no debts. It appears, however, that on July 25, 1917, the corporation filed an income-tax return, and on August 30, 1917, filed an excess-profits tax return, both for the period in question and both disclosing its invested capital, its indebtedness, and its net income. These returns were on the forms then provided and disclosed the tax due under the statutes then in force. On September 28, 1917, an amended excess-profits tax return was filed. These taxes were paid. A different tax was levied by the act of October 3, 1917, and different forms of return prescribed, which the
397 corporation declined to make. Art. 61, Reg. 33, expressly provides for a particular form of return in case of a corporation dissolved prior to October 3, 1917. Congress has power to prescribe forms for returns. (Updike v. U. S., 8 F. (2d) 913 (8 C. C. A.).) After the corporation declined to make a return under the October, 1917, law, the Government agents audited the books and incorporated the result of such an audit on a return blank, which was not signed or sworn to but which was made the basis of the assessment. Although the evidence is not entirely clear, we are of the opinion that the tax due under the October, 1917, law could not have been accurately computed from the information given by the returns filed by the company under the earlier statutes. It is clear, however, that the Government auditors secured from the books all the information necessary to make the assessment which was made under the October, 1917, law. In fact, the Government vouches for the completeness of this information by suing on it.

It is largely a legal question of whether this is a no-return case. When the statutes of limitation refer to a "failure to file a return," do they mean a return "signed by the taxpayer"? If they do, this is a no-return case. On the other hand, if they mean to exclude from the limitations statute those cases in which the Government is not aware of any tax liability on account of a failure to file a return, then this is not a no-return case, for the Government had more and better information from the audit than it could get from a return.

This particular question has been ruled by this court in the case of Updike v. U. S. (8F. (2d) 913). In that case another of the Updike companies dissolved during the summer of 1917 and declined to make a return on the forms prescribed by the commissioner for the collection of taxes under the October, 1917, law, and for the same reason as that given here. In that case, too, the corporation had made returns under the earlier laws before dissolution. The brief for appellees states:

"Returns had been filed for that company in the same manner as they had been filed for the Updike Grain Company."

There, as here, the Government made its own audit. It is said in argument that the record in that case does not disclose the extent of the audit made and that the record in this case does. That
398 is not material. The court in the cited case was advised of the earlier returns, the refusal to make a return after dissolution under the new law, and that the "Revenue Department thereupon made a computation" of the tax due. The case is therefore controlling. We quote excerpts from the opinion:

"To this we can not agree. Returns under the acts of 1916 and March 3, 1917, obviously could not cover the increased taxes imposed by the later act. For the ascertainment of the latter a return would be logical and essential, and its requirement accords with the procedure established by Congress in all revenue laws of this nature.

"(2) The sections of the act above quoted clearly call for such returns, and it was within the power of Congress to authorize the Commissioner of Internal Revenue to prescribe the formal administrative features of time and form in the making of such returns. The provision that 'any amount heretofore paid on account of the tax imposed by such title 2 shall be credited toward the payment of the tax imposed by this title' does not negative the requirement of a return under the act of October 3, 1917, nor make such a return supplemental to those previously furnished. It might very well be that no previous return had been made by one subject to tax under prior acts. In such case a return must be made under the act of October 3, 1917, and not under those prior acts. This provision was inserted for the protection of the taxpayer against double taxation for the same period and has to do with payments made, not with the returns from which such payments were computed.

"(3) In this case a return was required, and none made, in a true legal sense. Therefore the limitation invoked has no application."

This decision is not only controlling, but, in our judgment, is right. This company discovered no obstacle in the way of making an amended return, under the old law, on September 28, 1917, after dissolution and no difficulty in finding officers to file claims for abatement of earlier taxes after that date. It could have made one under the October law. It knew the Government had power to make a tax retroactive. As a matter of fact, the bill passed in October was well along in preparation in July. Certainly a corporation can not formally dissolve, decline to pay a tax that its neigh-
399 bors pay, claim an inability to make a return, and then seek protection behind a statute of limitations that expressly excludes cases where no return is filed. It is argued that the 1921 law uses the phrase "required return," while the later statutes simply say "return." This change was to do away with quibbling as to the correctness of the return or whether the return or amended return governed and can not alter the decision in the first Updike case above referred to. It is therefore a no-return case.

This brings us to the main contention, the statutes of limitations. We may well start with the proposition that lapse of time does not destroy the Government's right to collect a tax unless some statute says so. While this is a case against transferees, we must consider that it is a proceeding in court to collect a tax, notwithstanding that it is an action against transferees. Since the argument herein the case of Russell v. U. S. has been decided by the Supreme Court of the United States (No. 58, Jan. 2, 1929). That was an action in equity against the stockholders of a dissolved corporation "to impress the assets received by them with a trust and to recover the amount of taxes assessed against the corporation." (Id. 22 Fed. (2d) 249.) That is this action. The Supreme Court held such action was "a proceeding for the collection of taxes" and was barred.

We turn now to the statutes of limitation in the various acts, bearing in mind that these statutes are not retrospective unless expressly so. (U. S. v. Magnolia Pet. Co., 276 U. S. 160; Russell v. U. S., supra.)

The 1918 statute (c. 18, 40 Stat. 1057, 1083, sec. 250 (d)) does not bar the claim, for the limitations therein apply only to the taxes levied by that act. The 1921 law (sec. 250 (d), rev. act, 1921) does not bar the claim because the limitations therein contained start "after the return was filed." The 1924 law (sec. 278 (d), rev. act, 1924) for the first time starts the statute with the assessment, except for suits without assessment. This section is similar to section 278 (d) of the 1926 law. It has been expressly held, however, that section 278 of the 1924 act has no "possible application to cases where assessment had been made prior to June 2, 1924." (Russell v. U. S., supra.) There is left, then, the 1926 law.

400 The 1926 law (sec. 278 (d)) provides:

"(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior act of Congress has been made (whether before or after the enactment of this act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the commissioner and the taxpayer."

Three other amendments were made in 1926, in paragraphs 2, 3, and 4 of the preceding section (277), which are of significance. Prior to the 1926 amendments these paragraphs provided that "and no proceeding in court for the collection of such taxes shall be begun" after the period fixed in each paragraph for assessment. That is, prior to 1926, the period for assessment or court action were the same; the Government had to assess or sue, or assess and sue, within the particular period, say five years.

But in 1926 in all three paragraphs the limitation on proceedings in court was qualified by inserting the words "without assessment,"

so that the paragraphs now read "and no proceeding in court without assessment for the collection of such taxes shall be begun," etc.

Take these amendments in connection with 278 (d) quoted above, and the idea of Congress is clear and inescapable. Congress fixed one period (say five years) for the initial move against the taxpayer, whether it be by assessment or suit without assessment, and a different period (6 years) for the second move, distraint or court proceedings, after assessment. For the second move we look to 278 (d) and that alone.

Now there was an assessment here, made in January, 1920. So 278 (d), laws of 1926, governs and nothing else. Let us then see whether this section bars this action.

(1) "Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior act of Congress * * *." It is expressly retroactive and covers taxes imposed by the 1917 law, thereby differing from sec. 278 (d) of the 1924 act.

401 (2) "has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto * * *." The assessment was made in this case in 1920. It is vigorously urged that in a no-return case there is no period of limitation for assessment, and therefore this section does not apply. But the argument does not persuade. The intent in the words "within the statutory period of limitation applicable thereto" is too plain for mistake. This section authorizes the Government to sue after a proper assessment; the Board of Tax Appeals had been created, and Congress wanted to extend the time for suit for a reasonable period after assessment, so that appeals to the board could be prosecuted, etc. But Congress didn't want to give that right to sue if the assessment was barred by the statute when it was made. Therefore Congress qualified the right to sue by providing that the assessment must have been made in time. The assessment here was made in time, and that phrase has served its purpose.

(3) "such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this act) * * *." It was argued that this is an equitable proceeding to impress a trust upon certain assets and is not a "proceeding in court" to collect a tax, as contemplated by this section. But since the argument the Supreme Court, in the Russell case, supra, has held that an identical case was barred by an identical statute.

(4) "but only if begun (1) within six years after the assessment of the tax." The tax was assessed in 1920 and the suit brought in 1927.

This section covers this case, and this action is barred.

It is argued that throughout all the statutes Congress has expressly provided that in case of a false or fraudulent return, or in case of a failure to file a return, the tax may be assessed, or a "proceeding in court for the collection of such tax may be begun without

assessment at any time"; that therefore such a limitation should be read into 278 (d). It is probably true that the Government could now maintain this suit if the assessment had not been made in 1920, and probably true that if the assessment had never been made it could now be made. If it is true, it is unfortunate. But it still remains true that this is not a suit "without assessment" and is therefore not within the savings clause. It is still true that Con-
402 gress did not expect from 278 (d) cases where an assessment was made without return. There may have been good reasons why Congress did not want the Government to have unlimited time to bring a suit after the department knew the amount of tax due and assessed it; but whether that be true or no, Congress, and not the courts, must be asked to amend the statutes. If it should be suggested that the six years provided in the 1926 law had elapsed when the 1926 statute was passed, and that it is unfair to bar a claim of the Government without notice, it may be answered again that it was for Congress to enact a savings clause if one were desired. The power of Congress to enact a statute barring suit by the Government without a savings clause as to claims thereby automatically barred has not been challenged, either here or in the court below, and need not be considered.

We conclude that this action is barrd by the statute. Questions argued in the cross-appeal need not be discussed except to say that the provisions of section 280 (Laws of 1926), providing for assessment against transferees, are cumulative and do not bar this suit. Over and beyond distraint and statutory proceedings in court there exists the plenary powers of courts of equity. Updike v. U. S., 8 F. (2d) 913 (8 C. C. A.); U. S. v. Armstrong, 26 F. (2d) 227, (8 C. C. A.) Such remedies are cumulative, and the existence of a statutory remedy does not bar this suit. (Dollar Savings Bank v. U. S., 86 U. S. 227; sec. 1122 (b), rev. act, 1926.) Section 280, enacted first in 1926, limits the period for assesment against transferees but does not limit court proceedings against them. Since 280 was enacted by the same Congress as enacted new section 278 (d), it fortifies our conclusion and that of the Supreme Court in the Russell case, to wit, that 278 (d) applies to transferees. Congress was legislating on the subject and covered limitations on assessments (but not suits) against tranferees in 280, and covered suits (but not assessments) against transferees in 278 (d). No assessment has been made againt the transferees herein, as suggested by counsel for appellees; but we need not consider here any question of the limitation of time for such assessment under 280 or the limitation of a proceeding in court after such assessment.

403 The decrees of the court below are affirmed on both appeals.

404 In United States Circuit Court of Appeals,
Eighth Circuit

No. 8241

UNITED STATES OF AMERICA, APPELLANT

vs.

NELSON B. UPDIKE, METTA E. UPDIKE, N. B. UPDIKE, Jr., HAZEL Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Charles Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Joseph P. McGrath, Ed P. Smith, and George A. Roberts

Appeal from the District Court of the United States for the District of Nebraska

And No. 8244

NELSON B. UPDIKE, METTA E. UPDIKE, N. B. UPDIKE, Jr., HAZEL Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnefred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Charles Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Joseph P. McGrath, Ed P. Smith, and George A. Roberts, appellants

vs.

UNITED STATES OF AMERICA

405 Mar. 25, 1929

Appeal from the District Court of the United States for the District of Nebraska

Decree

These causes came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska and were argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court in these causes be, and the same is hereby, affirmed, without costs to either party in this court.

In United States Circuit Court of Appeals

Number 8241

[Title omitted.]

Petition for rehearing

Filed May 16, 1929

The appellant and petitioner, United States of America, respectfully petitions this court to grant a rehearing of appellant's above-entitled appeal and to reconsider its opinion and decision filed in the office of the clerk of this court March 21, 1929, for the following reasons, namely:

406

1. In its said opinion and decision this court misconstrued the meaning of section 277 (a) (3) of the revenue act of 1926.

2. In its said opinion and decision this court misconstrued the meaning of section 278 (d) of the revenue act of 1926.

3. In its said opinion and decision this court misconstrued the meaning of section 277 (a) (2) of the revenue act of 1924.

4. In its said opinion and decision this court erroneously held the limitation provisions of the revenue act of 1926 to be applicable to what this court, as appears at page 5 [399] of its opinion, had already held to be "a no-return case."

5. In its said opinion and decision, as appears at page 5 [399] of the opinion, this court misconstrued and misapplied the decision of the Supreme Court of the United States in Russell v. United States (73 L. Ed. 162).

Wherefore petitioner prays that a rehearing of this appeal be granted.

GEORGE A. KEYSER,
Assistant United States Attorney,
AMBROSE C. EPPERSON,
Assistant United States Attorney,
JAMES C. KINSLER,
United States Attorney,
Attorneys for Appellant and Petitioner.

MAY 15, 1929.

CERTIFICATE OF COUNSEL

The undersigned attorney and counsel for appellant and petitioner, United States of America, hereby certifies that the within and foregoing petition for rehearing is presented in good faith and not for delay.

JAMES C. KINSLER,
United States Attorney.

[File endorsement omitted.]

407 In United States Circuit Court of Appeals

Order denying petition for rehearing

May 29, 1929

This cause came on this day to be heard upon the petition for a rehearing, filed by counsel for appellant.

On consideration whereof it is now here ordered by this court that said petition for a rehearing of this cause be, and the same is hereby, denied.

In United States Circuit Court of Appeals

Motion for stay of mandate

Filed June 3, 1929

To the honorable the JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

The petition of the appellant, United States of America, by James C. Kinsler, United States attorney for the District of Nebraska, acting by authority of the Attorney General of the United States, respectfully represents:

1. That on March 21, 1929, an opinion of this court was filed herein affirming the judgment of the United States District Court for the District of Nebraska, Omaha division, in favor of Nelson B. Updike and others in an action in which the United States of America, as plaintiff, sought to recover from said Nelson B. Updike and others, former stockholders of Updike Grain Company, a corporation, and transferees of the assets of said corporation during the year 1917, the sum of $373,911.54, together with interest and costs, said principal amount being the amount of war-income and excess-profits taxes imposed on said corporation by the revenue act of October 3, 1917, and which said corporation refused and neglected to pay.

408 Said Updike Grain Company, the corporate taxpayer, at all times refused and neglected to file the return or returns for its war-income and excess-profits taxes, as required by said revenue act of October 3, 1917, and by the regulations of the Treasury Department of the United States.

Said action of the United States of America against said Nelson B. Updike and others, transferees of the assets of said Updike Grain Company, was commenced April 28, 1927, and the trial court held that the prosecution of said action was barred by the provisions of section 278 (d) of the revenue act of 1926. And this court, in its said opinion filed herein March 21, 1929, after holding this to be "a no-return case," affirmed said judgment of the trial court and held that the prosecution of appellant's said action against said Nelson B.

Updike and others was barred by the provisions of said section 278 (d) of the revenue act of 1926.

Within sixty days from said March 21, 1929, namely, May 16, 1929, said appellant filed herein its petition for rehearing of said decision and opinion of this court, together with brief in support of said petition for rehearing. And said petition for rehearing was overruled by this court May 29, 1929.

2. The question presented by appellant's assignments of error is whether the prosecution of said action of the appellant, the United States of America, against said Nelson B. Updike and others, transferees of the assets of said Updike Grain Company, is barred by said section 278 (d) of the revenue act of 1926 or by any of the limitation provisions of the revenue acts of 1921, 1924, or 1926.

3. The petitioner, by advice of the Attorney General of the United States, desires that the Supreme Court of the United States be
409 asked to pass upon the questions involved herein with a view of procuring a reversal of this court's said opinion and decision and to have finally determined the question whether appellant's said action against said Nelson B. Updike and others, transferees of the corporate assets of said Updike Grain Company, is barred by the statute of limitations, namely, by said section 278 (d) of the revenue act of 1926, or by any of the limitation provisions of the revenue acts of 1921, 1924, or 1926.

4. The acts of Congress and t rules of the Supreme Court of the United States in such cases made and provided fix the time within which petitions for writs of certiorari may be filed in the Supreme Court of the United States at three months from the date of final decision sought to be reversed, in this case three months after May 29, 1929. It is further provided by rule 35 of said Supreme Court of the United States that the party making application for the writ of certiorari shall serve on counsel for respondents, within ten days after the filing thereof, a copy of the petition and the printed record and supporting brief, and the act of Congress in such cases made and provided allows at least three months in which to file said petition for the writ of certiorari.

5. This petitioner is prepared to perfect the record in this case and to file its petition for the writ of certiorari in the Supreme Court of the United States on or before the 28th day of June, 1929.

6. This petitioner is advised that in order that the proceedings herein may remain in their present status, pending the disposition of such petition for the writ of certiorari, a special order of this court is required to stay the issuing of the mandate of this court pending the time necessary, as above set forth, for the presentation of said petition for the writ of certiorari to the Supreme Court of the United States.

410 7. As the Government of the United States of America is the petitioner herein, it should not be required, and by law is not required, to give bond requiring the faithful prosecution of

said petition for the writ of certiorari or for damages incident to a refusal thereof.

Wherefore your petitioner prays that this honorable court enter an order herein directing the clerk of this court to withhold the mandate in this cause pending the filing of petitioner's petition for the writ of certiorari in the Supreme Court of the United States until June 28, 1929, and that if said petition shall have been filed in said Supreme Court of the United States on or before that date said mandate of this court be further withheld until said Supreme Court of the United States shall act upon said petition for the writ of certiorari and that this petitioner be not required to give bond for the faithful prosecution thereof.

Dated at Omaha, Nebraska, June 1, 1929.

UNITED STATES OF AMERICA,
Appellant and Petitioner,
By JAMES C. KINSLER,
United States Attorney,
and AMBROSE C. EPPERSON,
Assistant United States Attorney.

[File endorsement omitted.]

411 In United States Circuit Court of Appeals

Order staying issuance of mandate

June 3, 1929

On consideration of the motion of appellant for a stay of the mandate in this cause until June 28, 1929, pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this court that the said motion be, and it is hereby, granted, and if there is filed with the clerk of this court on or before that date a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed and proof, by affidavit, of notice thereof under paragraph 3 of rule 38 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

412 [Clerk's certificate to foregoing transcript omitted in printing.]

413 In United States Circuit Court of Appeals

[Title omitted.]

Order staying mandate

July 22, 1929

On consideration of the supplemental petition for additional stay of mandate pending petition of appellant to the Supreme Court

of the United States for a writ of certiorari, it is now here ordered by this court that the issuance of the mandate in this cause be, and is hereby, further stayed until August 26, 1929, and if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed and proof, by affidavit, of notice thereof under paragraph 3 of rule 38 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

July 22, 1929.

414 [Certificate to foregoing paper omitted in printing.]

415 Supreme Court of the United States

Order allowing certiorari

Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 34471. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 340. The United States of America, petitioner, vs. Nelson B. Updike et al. Filed August 23, 1929. File No. 34471.

U. S. GOVERNMENT PRINTING OFFICE: 1930